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In The Supreme Court Of The United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER BANKRUPTCY COURTS LACK JURISDICTION OF LIQUIDATION PROCEEDINGS UNDER THE SECURITIES INVESTOR PROTECTION ACT (15 U.S.C. § 78aaa, et seq.)?

II. WHETHER PETITIONERS, BY HAVING FACTUAL ISSUES RESOLVED BY A NON-ARTICLE III JUDGE AND REVIEWED ON A CLEARLY ERRONEOUS STANDARD BY THE DISTRICT COURT, WERE UNCONSTITUTIONALLY DEPRIVED OF AN OPPORTUNITY TO HAVE THEIR CASE HEARD DE NOVO BY AN ARTICLE III JUDGE WHERE THEIR CLAIM INVOLVES A "PRIVATE RIGHT" UNDER GRANFINANCIERA, S.A. v. NORDBERG, 492 U.S. 33 (1989)?

A. WHETHER THE TENTH CIRCUIT'S HOLDING THAT "NOTWITHSTANDING THE FACT THAT PREFERENTIAL AND FRAUDULENT TRANSFER PROCEEDINGS MAY INVOLVE PRIVATE RIGHTS . . . THE BANKRUPTCY COURT HAD JURISDICTION UNDER ARTICLE III TO ADJUDICATE THE TRUSTEE'S SUIT" IS AT ODDS WITH THIS COURT'S DECISION IN GRANFINANCIERA, S.A. v. NORDBERG, 492 U.S. 33, 54 (1989) AND REFLECTS CONFUSION AMONG THE CIRCUITS ON THIS QUESTION?

B. WHETHER PETITIONERS' FILING OF A SIPA PROOF OF CLAIM FOR ATTORNEY'S FEES STRIPS THEM OF THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR CASE HEARD BEFORE AN ARTICLE III JUDGE?

PARTIES TO THE PROCEEDINGS

The following are all of the parties to the proceedings:

1. James H. Turner, Trustee
2. Davis Gillenwater & Lynch, a Partnership
3. Gilbert K. Davis
4. O'Connor & Hannon, a partnership
5. Securities Investment Protection Corporation

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IN THE SUPREME COURT OF THE
UNITED STATES

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

v. Petitioners,

JAMES H. TURNER, Trustee, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals to the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Gilbert K. Davis and Davis, Gillenwater and Lynch, the petitioners herein, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case, on September 17, 1993.

M#191012

OPINIONS BELOW

The September 17, 1993 opinion of the Court of Appeals whose judgment is herein sought to be reviewed, is reported at 4 F.3d 1556 (1993) and is re-printed in the appendix to this petition at pages A1 - A50. The prior opinion of the United States District Court for the District of Colorado was entered May 15, 1990 and is reported at 136 B.R. 1008 (Dist. Colo. 1989) and is reprinted in the appendix to this petition at pages A51 - A114. The unpublished decision of the bankruptcy judge, which was reversed by the above decisions on the issue of jurisdiction, was issued on December 10, 1985, and is reprinted in the appendix to this petition at pages A115 - A165.

STATEMENT OF JURISDICTION

The judgment of The Court of Appeals was entered on September 17, 1993. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED.

Provisions of law which are involved in this case:

1. Article III of the United States Constitution;
2. Seventh Amendment to the United States Constitution;
3. 15 U.S.C. § 78aaa et seq;
4. Section 115 of the Bankruptcy Amendments and Federal Judgeships Act of 1984;
5. 28 U.S.C. § 157;
6. 28 U.S.C. § 1334;

7. Bankruptcy Rule 8013;

8. 11. U.S.C. § 329.

These constitutional provisions and statutes are reprinted in relevant part in the appendix to this petition at pages A166-A179.

STATEMENT OF THE CASE

This petition involves a broker dealer liquidation case which presents the questions of whether bankruptcy judges have jurisdiction to hear claims arising out of the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa, et seq., and whether the petitioners were entitled to have their case, involving "private rights," heard by an Article III tribunal rather than merely upheld by an Article III court under a clearly erroneous standard of review. On July 10, 1981 the Securities Investment Protection Corporation ("SIPC") filed a complaint in the United States District Court

for liquidation of the broker/dealer, Investment Banker, Inc. The liquidation proceeding was removed to the United States District Court for the District of Colorado on July 15, 1981, pursuant to § 5-B-4 of SIPA, 15 U.S.C. § 78eee(b)(4). After the case was removed to the United States Bankruptcy Court for the District of Colorado, the trustee, Turner, filed a complaint in the bankruptcy court seeking to avoid the transfer of two checks to the law firm of Davis, Gillenwater & Lynch. The disputed checks were: Check #13417 dated July 10, 1981 to Gilbert K. Davis, in the amount of $11,858.00 and check #13432 dated July 10, 1981 payable to Gilbert K. Davis of Davis, Gillenwater & Lynch in the amount of $25,000.00.

The petitioners appeared in the bankruptcy court and asserted at the time of

trial in July, 1984 that after the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), the bankruptcy courts had no jurisdiction over broker/dealer liquidation proceedings under SIPA because the provisions of BAFJA placed jurisdiction of such actions in the district court. Petitioners also argued that permitting a non-Article III judge to adjudicate matters involving preferences and fraudulent transfers was unconstitutional.

The bankruptcy judge agreed with the petitioners in determining that bankruptcy courts did not have jurisdiction under SIPA to conduct liquidations of broker/dealers. This opinion appears at A115 - A165. In the bankruptcy judge's decision, oddly enough, he set out the findings of fact he would have made had he possessed jurisdiction to decide

the matter. A151 - A164. These findings were adverse to petitioners.

The trustee and SIPC appealed the bankruptcy court's opinion to the district court which reversed the bankruptcy judge's finding that he did not have jurisdiction over liquidations under SIPA. The district court "upheld" the factual determinations of the bankruptcy judge under the "clearly erroneous" standard of review.[1] The petitioners ultimately appealed to the Court of Appeals for the Tenth Circuit which affirmed the decision of the district court by opinion of September 17, 1993.

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[1] The case was remanded for additional determinations (involving pre-judgment interest) which are not relevant to this petition. See A106 - A114, and A12 - A13.

REASONS FOR GRANTING THE WRIT

Summary of Argument

I. There has been no legislative action to invest bankruptcy judges with jurisdiction of SIPA matters. SIPA, by its own terms, states that liquidation proceedings under that statute are to proceed in the federal court "having jurisdiction over cases under Title 11." 15 U.S.C. § 78eee(b)(4). Under BAFJA, the district courts have original and exclusive jurisdiction of cases under Title 11. 28 U.S.C. § 1334. Moreover, under 28 U.S.C. § 157, district courts only have authority to refer to the bankruptcy judges for the district "cases under Title 11, and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11." 28 U.S.C. § 157. Title 15 SIPA cases simply do not fall into any of these

categories and are outside the scope of cases or proceedings which may be referred to bankruptcy judges.

The appellate courts found the literal interpretation of Congress' legislation to be an "absurd" result, and held that bankruptcy judges could hear and determine Title 15 SIPA actions. In so ruling these courts improperly permit "private rights" of petitioners under Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989), to be adjudicated by non-Article III judges on a wholesale basis. The decision appealed from runs counter to this Court's ruling in Granfinanciera, counter to Article III of the Constitution, and is in clear conflict with the statutory language which places Title 15 matters within the aegis of district courts.

II. Petitioners were denied the opportunity to be heard by an Article III

judge despite the fact that this case, under Granfinanciera, involves "private rights." Just as Congress could not eliminate a litigant's Seventh Amendment right to trial by jury in an action at law to recover a fraudulent conveyance by classifying the proceeding as core, Congress cannot deny petitioners here their Constitutional right to an adjudication by an Article III judge through the same process. Adjudication of a core proceeding by a bankruptcy judge, subject to the "clearly erroneous" standard of review at the district court level, is not an adjudication by an Article III judge.

In devising a system by which findings of a non-Article III judge involving "private rights" are reviewed by an Article III court under the "clearly erroneous" standard of

review, Congress has denied petitioners Constitutional protections under Article III. The various Courts of Appeals, even in light of this Court's decision in Granfinanciera, are reaching conflicting conclusions on the constitutionality of the bankruptcy judges' authority to adjudicate private rights. These conflicting views are creating confusion for litigants and the courts in attempting to determine the extent to which a non-Article III tribunal can adjudicate matters of private rights. This Court should grant this writ to resolve this issue.

ARGUMENT

I. BANKRUPTCY COURTS LACK JURISDICTION OF LIQUIDATION PROCEEDINGS UNDER THE SECURITIES INVESTOR PROTECTION ACT (15 U.S.C. § 78aaa et seq.).

A. Congress has not Provided any Statutory Basis for Conferring Jurisdiction of Title 15 Litigation upon Bankruptcy Judges.

The Bankruptcy Judge, in analyzing whether he had jurisdiction to hear Title 15 SIPA matters, properly observed:

> There has been no legislative action to invest bankruptcy judges with any jurisdiction over SIPA matters. . . . The reference authority set forth in 28 U.S.C. § 157 only refer[s] title 11 matters to bankruptcy judges.

A142. A review of relevant statutes confirms this conclusion.

The statute at the center of the controversy below is the Securities Investor Protection Act ("SIPA") which was enacted in 1970 to protect individual investors from financial hardship and other related problems. Under Section 78eee of the act as originally enacted, a SIPA liquidation was commenced by the filing of an application for

a customer protective decree in the Federal district court. Upon filing, the district court acquired exclusive jurisdiction over the debtor and its property. The 1970 Act further provided that the case would be removed to the bankruptcy court in the event of a trustee's appointment.

SIPA predated the Bankruptcy Reform Act of 1978, which completely overhauled the bankruptcy system. Under the Bankruptcy Reform Act of 1978, bankruptcy courts were created which were separate from district courts and adjuncts thereto. These newly created bankruptcy courts, which were presided over by non-Article III judges, were granted exclusive jurisdiction over bankruptcy matters.[2] As a result of the wholesale overhaul of the bankruptcy system

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[2] See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53-54 & n.3 (1982).

in 1978, a substantial change was necessitated in the manner by which SIPA liquidations were referred. The Bankruptcy Reform Act of 1978 made significant changes in SIPA to conform it to the new bankruptcy system.

The Securities Investor Protection Act of 1970 had contained numerous cross references to the Bankruptcy Act which governed bankruptcy prior to 1978. Section 308 of the Bankruptcy Reform Act of 1978 included some fifteen changes in cross references to the old Bankruptcy Act in order to conform SIPA to the changes in Title 28 and the newly proposed Title 11 of the United States Code. One such 1978 change altered the cross reference in SIPA to the courts then handling bankruptcy cases in the pre-1978 system to the newly created courts that

would have jurisdiction of bankruptcy cases under the new 1978 code.

This appears as Section 78eee(b)(4) of SIPA in the 1978 legislation, and reads as follows:

> Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made. (Emphasis added.)

The statute, therefore, as amended in 1978, granted jurisdiction over SIPA cases to the courts having jurisdiction over cases under Title 11. (The new Bankruptcy Code.)

In 1982, this Court declared the jurisdictional provisions of the 1978 Bankruptcy Reform Act to be unconstitutional.

Marathon, 458 U.S. 50 (1982). Revision of the Act's Title 28 provisions was indicated. It took Congress two years to do this and the legislative product, known as BAFJA, enacted July 10, 1984, was passed as a floor amendment and did not go through the careful Committee process appropriate to major legislation. Consequently, its legislative history is very limited.

BAFJA did not contain the extensive cross reference provisions found in its 1978 predecessor. For whatever reason, BAFJA did not discuss or cross reference SIPA. The provision in SIPA (15 U.S.C. § 78eee(b)(4)) requiring removal to the court "having jurisdiction over cases under Title 11" remained as before. Congress however elected in BAFJA to address bankruptcy jurisdiction in 28 U.S.C. § 1334 as follows:

> Except as provided in Subsection (b) of this Section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11. (Emphasis added.)

BAFJA dismantled the unconstitutional 1978 bankruptcy court system. Indeed, the bankruptcy court which was created in the 1978 Act was abolished by BAFJA and the former bankruptcy courts became a "unit" of the district court to which they were attached. 28 U.S.C. § 151.

These changes had an obvious impact on pending and future cases involving Title 15 SIPA claims.[3] Significantly, the 1984

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[3] The initial pleading in this litigation was filed in January, 1982, which was while the BAFJA abolished court system was still in effect. The Complaint specifically recited that jurisdiction arose under 28 U.S.C. 1471, which was repealed by BAFJA, and replaced by amended 28 U.S.C. 1334. When the 1984 amendments became effective, provisions were necessary to take care of cases, like this one, then pending in the court to be abolished. Section 115 of BAFJA endeavored to transfer all pending

(continued...)

amendments, having provided for the elimination of the unconstitutional bankruptcy courts, required transfer of cases pending in the now defunct courts to the district court, and placed jurisdiction of all future Title 11 cases in the district courts.

BAFJA did provide a means by which district courts could refer proper matters to bankruptcy judges. Notably, however, Congress provided no mechanism by which a Title 15 SIPA case could be referred to or heard by a bankruptcy judge under the 1984 amendments. Under BAFJA, Congress enacted 28 U.S.C. § 157 to provide the procedure for referral of bankruptcy cases and proceedings from the district courts to the bankruptcy

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[3](...continued)
cases to the district courts. Section 115 can be found at pages A168 - A170 of the Appendix.

judges for the district. Section 157 provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under § 158 of this title.

Simply put, the only matters which a bankruptcy judge is permitted to hear under BAFJA are those cases referred to the judge by the district court under Title 11 or those proceedings arising under Title 11 or arising in or related to a case under Title 11. Title 15 SIPA cases and proceedings simply do not fall into these categories.

The Bankruptcy Judge in this proceeding, in analyzing Title 15 SIPA actions, succinctly and properly observed:

> SIPA matters are not "cases under title 11" and are not proceedings "arising under" or "arising in or related to a case" under title 11. SIPA matters arise under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, et seq. It can readily be seen that the Securities Investor Protection Act is not a title 11 matter. It is a title 15 matter. Further, I can not construe title 15 matters to be "related to" title 11 cases.

A140. This result is reinforced by the fact that, under § 78eee(b)(4), SIPA cases are removed to the court having "jurisdiction over cases under Title 11". Under 28 U.S.C. § 1334, the courts having jurisdiction over cases under Title 11 are the district courts. In short, as the Bankruptcy Court concluded,

> a literal construction of § 78eee(b)(4) of the SIPA and § 157 of the BAFJA must necessarily result in depriving bankruptcy judges of any authority or jurisdiction to decide anything under a SIPA proceeding. There is simply no presently existing statutory authority for removal of a SIPA case from the district court to a bankruptcy judge.

A142.

The appellate courts concluded, however, that a literal interpretation of the statutes would undercut perceived Congressional intent. The simple response to the analysis crafted by those courts is that statutory construction is unnecessary and inappropriate in this case. Resort to legislative history is only proper where the language of a statute is unclear. Blum v. Stenson, 465 U.S. 886, 896 (1984). Where statutory language is clear, reliance upon committee reports, legislative comments, and the like is outside the scope of proper review. There

is no ambiguity in the language of the statutes here under review with respect to whether bankruptcy courts have jurisdiction over liquidation proceedings under Title 15.

Neither 28 U.S.C. § 1334, 28 U.S.C. § 157 nor 15 U.S.C. § 78eee(b)(4) speak in terms of conferring jurisdiction of Title 15 cases on the bankruptcy courts as they were constituted in 1984. As the bankruptcy court concluded:

> only title 11 cases and matters relating to, or arising in or out of title 11 cases may be referred to bankruptcy judges under legislation promulgated by the Congress. Had Congress desired to include title 15 matters in the legislative reference allowance, it only needed to include a sentence in 28 U.S.C. § 157 so providing.

A144.

Ultimately, respondents convinced the appellate courts below that the literal language used by Congress, which fails to confer bankruptcy judges with jurisdiction

over SIPA cases, must be rejected because it would lead to "absurd" results. The result which the Tenth Circuit found unpalatable is that 15 U.S.C. § 78eee(b)(4) speaks in terms of "removal" of a liquidation proceeding from the district court "to the court of the United States in the same judicial district having jurisdiction over cases under Title 11." In light of 28 U.S.C. § 157, the Court of Appeals determined that it is "absurd" for a district court to remove a case to itself. 4 F.3d at 1564; A 34.

The cause of the confusion is the interplay between the 1984 BAFJA amendments and SIPA, which is discussed at length above. Simply put, SIPA's § 78eee(b)(4) has been overtaken by events. There is no provision in 28 U.S.C. § 157 allowing the district court to refer cases that arise under 15 U.S.C. § 78aaa et seq, to a bankruptcy court.

The 1984 BAFJA amendments limit the matters a district court can refer to a bankruptcy judge to "all cases under Title 11 and any and all proceedings arising under Title 11, or arising in or relating to a case under Title 11."[4] Indeed, under BAFJA the separate and distinct (and unconstitutional)

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[4] Hence, the result advanced by respondents (and ultimately adopted by the Tenth Circuit) makes no practical sense as the bankruptcy judge determined:

> To uphold the SIPC's line of reasoning on this issue would result in conferring jurisdiction in the bankruptcy judges over title 15 matters by way of removal "to the court of the United States. . . having jurisdiction over cases under Title 11" [78eee(b)(4)] when bankruptcy judges do not even have jurisdiction over the cases under Title 11. This, too, is an absurd result.

A143 - A144. (Citation omitted.)

"bankruptcy courts" created by the 1978 Bankruptcy Act, and contemplated in § 78eee(b)(4), no longer exist and are, therefore, unavailable to assume jurisdiction over SIPA matters. Accordingly, after the 1984 BAFJA amendments, any concern voiced by the Tenth Circuit that it is absurd under § 78eee(b)(4) for a district court to "remove" a case to itself is anachronistic. Even a "removal" to a bankruptcy judge would now occur within a "unit" of the same district court.[5]

In enacting BAFJA, Congress, for whatever reason, chose not to include SIPA

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[5] If a "transfer" results in the same court having jurisdiction, that is no reason to rewrite either SIPA or bankruptcy legislation. Indeed, the internal "transfer" of a case within a single judicial entity is hardly an "absurd" circumstance. Such a transfer often occurs in jurisdictions which have preserved law and equity practice such that a transfer from one side of the court to the other frequently becomes necessary.

within the class of cases which could be heard by bankruptcy judges. And what respondents' "absurdity argument" repeatedly fails to address is that neither BAFJA nor SIPA expressly or impliedly give bankruptcy courts jurisdiction over Title 15 cases. Even if the language of SIPA supported respondents' suggestion that jurisdiction of Title 15 liquidations is conferred on bankruptcy judges, any alleged conflict between the pre-1984 SIPA and the 1984 BAFJA must be resolved by permitting the latter statute to prevail. Watt v. Alaska, 451 U.S. 259, 267 (1981); 12B Singer, Sutherland on Statutes and Statutory Construction § 51.02 (5th ed. 1992).

BAFJA, the latter-enacted statute, is notable for its clear pronouncement that bankruptcy judges' jurisdiction is limited to Title 11 cases or those related to or arising

in a case under Title 11. Congress did not give district courts the power or the authority to refer cases arising under Title 15 to bankruptcy judges. As this Court has stated in several recent cases, "the fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." Union Bank v. Wolas, 502 U.S. ____, 112 S.Ct. 527, 531 (1992); Toibb v. Radloff, 501 U.S. ___, 111 S.Ct. 2197 (1991).

It must be presumed that Congress recognized after Marathon that there would be jurisdictional challenges to allowing bankruptcy courts to adjudicate securities matters. Congress' decision to reserve jurisdiction of Title 15 matters in Article III courts should not be "relegislated" by judicial fiat. Particularly is this so where

such a broad reading of congressional "intent" would do violence to prior decisions of this Court.

B. Statutes are to Be Construed as Constitutional Where Possible; To the Extent That Respondents' Reading of the Relevant Statutes Would Provide Bankruptcy Judges With Jurisdiction Over SIPA Claims, Their Interpretation is in Direct Conflict with the Constitution and the Prior Decisions of this Court and Must Be Rejected.

If the respondents are correct and Title 15 SIPA claims are matters for adjudication by a bankruptcy judge, then various protections guaranteed by the Constitution, and upheld by this Court in Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989) become dust in the wind. SIPA claims, such as those at issue here, often involve "private rights" within the meaning of Granfinanciera. As such, this Court specifically has held that litigants have a right to have such matters

resolved by juries and in Article III courts. 492 U.S. at 54-55. Yet under respondents' analysis, Congress somehow intended these matters to be swept into bankruptcy courts and decided by bankruptcy judges notwithstanding the unconstitutional consequences of such a result. Indeed, if Congress had expressly intended to deprive SIPA litigants of their rights to trial by jury and adjudication of "private rights" by an Article III judge, it could not do so. Granfinanciera, 492 U.S. at 54-55. Where Congress has not expressly placed Title 15 SIPA matters within the jurisdiction of bankruptcy judges, the courts ought not presume a Congressional intent that would do violence to well-settled constitutional protections.

Indeed, under well-settled rules of statutory construction, it is presumed that

Congressional enactments were intended to be consistent with the Constitution. Buttfield v. Stranahan, 192 U.S. 470, 492 (1903); DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); 12A Sutherland Statutory Construction, supra, Statutes § 45.11. Statutes are to be construed to avoid doubts as to their constitutionality. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. ___, 113 S.Ct. 2264, 2283 (1993); Crowell v. Benson, 285 U.S. 22, 62 (1932); 12A United States Supreme Court Digest, Statutes, §§ 107-108 (Lawyers ed. 1992). Certainly, where there are two interpretations of a statute and one creates concern as to the act's constitutionality, the other interpretation

should be employed. Id.; DeBartolo Corp., 485 U.S. at 575.

The bankruptcy judge correctly decided below that he lacked jurisdiction to hear SIPA matters. The appellate courts below crafted a grant of jurisdiction to avoid a perceived "absurd" result. 4 F.3d at 1564; A34 - A40. But the result they achieved is more problematic than the one they sought to avoid: it runs afoul of the Constitution and the prior decisions of this Court. Certiorari should be granted to resolve this question of far-reaching jurisdictional importance in the federal court system.

II. PETITIONERS, BY HAVING FACTUAL ISSUES RESOLVED BY A NON-ARTICLE III JUDGE AND REVIEWED UNDER A CLEARLY ERRONEOUS STANDARD BY THE DISTRICT COURT, WERE UNCONSTITUTIONALLY DEPRIVED OF AN OPPORTUNITY TO HAVE THEIR CASE HEARD DE NOVO BY AN ARTICLE III JUDGE WHERE THE CLAIM INVOLVES A "PRIVATE RIGHT" UNDER GRANFINANCIERA, S.A. V. NORDBERG, 492 U.S. 33 (1989).

A. Petitioners were Entitled to Have an Article III Judge Hear and Determine Their Case Involving Their Private Rights.

Article III of the Constitution provides that the judicial power of the United States may be exercised only by judges appointed for life with compensation that cannot be diminished during their time in office. A166. The Good Behavior Clause and the Compensation Clause, as these are called, were incorporated in the Constitution to ensure the independence of the judiciary, which is fundamental to our American system of justice. This independent judiciary was celebrated and extensively discussed in The Federalist Papers as a great protection for the American people.

When Chief Justice John Marshall at age 74 rose at the Constitutional Convention of Virginia in 1829 to defend the concept of an

independent judiciary in Virginia, he had been Chief Justice for 28 years and the law had been his life for over half a century. When he spoke "of the independence of all those who try causes between man and man and between man and his government," he spoke with conviction. Chief Justice Marshall stated:

> I have always thought from my earliest youth till now that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary.

L. Baker, John Marshall. A Life in Law, p. 713 (MacMillan Publishing Co., Inc. 1974).

Justice Brennan more recently stated in Marathon:

> [O]ur Constitution unambiguously enunciates a fundamental principle - that the judicial power of the United States must be reposed in an independent judiciary. It commands that the independence of the judiciary be jealously guarded and it provides

> clear institutional protections for that independence.

458 U.S. at 60. Nothing is more clear in the Constitution of the United States than the right of American citizens to have their causes adjudicated in the Federal courts by an independent judiciary.

At the same time, the constitutional history of the United States bankruptcy court system is best characterized as a tug of war between Congress and the Supreme Court over that independence: a Congress, anxious to give the courts of bankruptcy the maximum powers consistent with an efficient bankruptcy court system but unwilling to staff the system with the independent judges required by Article III; and a Supreme Court, sensitive to the independence required by Article III, and reluctant to compromise it. This petition revisits the tension between Congress' efforts to have legal disputes

resolved expeditiously and the Constitution's guarantee to citizens that their private rights will be adjudicated by independent, Article III judges. Here, petitioners were denied the opportunity to present their case to an Article III judge. The question is whether adjudication of petitioners' private rights by a non-Article III judge under the circumstances of this case can pass Constitutional muster.

As enunciated by Justice Brennan, writing for the plurality, in Marathon, 458 U.S. at 70, there are three narrow exceptions to Article III which permit judicial power to be exercised by judges not appointed under Article III: Territorial Courts, Military Courts, and cases involving public rights. In discussing these exceptions to Article III Justice Brennan noted that only in these three instances "has the [Supreme] Court

declined to hold the authority of Congress subject to the general prescriptions of Article III." None of these exceptions apply to the instant case.

In Atlas Roofing v. OSHRC, 430 U.S. 442 (1977), this Court discussed the distinction between proceedings involving "public rights" (in which the Article III requirement is relaxed) vis-a-vis those involving "private rights" (in which the Article III requirement remains in force.) Subsequently, in Granfinanciera, S.A., et al. v. Nordberg, 492 U.S. 33 (1989) this Court ruled that an action to avoid an allegedly fraudulent conveyance under 11 U.S.C. § 548 is a private right and not a public right. In analyzing the history of a right to trial by jury in Granfinanciera, this Court also concluded that an action to avoid an alleged preferential transfer is also a private right

and not in the nature of a public right. As this Court stated,

> although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions. 492 U.S. at 55. (Emphasis added.)
>
> * * *
>
> . . . if a statutory cause of action such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III Court lacking the "essential attributes of the judicial power." 492 U.S. at 53. (Emphasis added.)

The decision of this Court in Granfinanciera establishes conclusively that a matter involving private rights ought not be adjudicated in a non-Article III Court; and that actions (such as those at issue here) to avoid an allegedly preferential

transfer or allegedly fraudulent conveyance are adjudications of "private rights." Using these principles as a starting point, it becomes clear that 28 U.S.C. § 157 as applied to this case denies petitioners their Constitutional right to be heard de novo by an Article III judge.

Here, petitioners were denied their right to an Article III adjudication of their private rights by the lower courts' treatment of this proceeding to avoid an allegedly fraudulent conveyance and an alleged preferential transfer as if it were a core proceeding. Under the statutory scheme for jurisdiction of the bankruptcy courts, a bankruptcy court may "hear and determine" (i.e., enter final judgment in) a core proceeding, subject to appeal to the district court. The standard for review, however, by the district court of findings of fact by the

bankruptcy court in such cases is set forth in Bankruptcy Rule 8013, as follows:

> Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Even though proceedings to determine, avoid or recover preferences and fraudulent conveyances are by statute identified as "core proceedings," such proceedings are, as outlined above, matters of private right, subject to adjudication by an Article III court. Granfinanciera, 492 U.S. at 53. Just as Congress could not eliminate a litigant's Seventh Amendment right to trial by jury in an action at law to recover a fraudulent conveyance by classifying the proceeding as core, Congress cannot deny petitioners here their Constitutional right to an adjudication by an Article III tribunal by classifying these proceedings to recover a fraudulent

conveyance and a preferential transfer as core proceedings. Adjudication of a core proceeding by a bankruptcy judge, subject to the "clearly erroneous" standard of review at the district court level, is not an adjudication by an Article III judge.

In devising a system by which an Article III court merely reviews the findings of a non-Article III court using the "clearly erroneous" standard of review, Congress has denied petitioners Constitutional protections under Article III. This deprivation cannot be glossed over:

> . . . the Constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level.

Marathon, 458 U.S. at 86, n.39.

These protections are of particular importance in the instant case in which the bankruptcy judge made numerous and lengthy findings of fact. A151 - A164. These findings were upheld simply on the basis that they were not "clearly erroneous." A14 - A15. Petitioners were entitled to have credibility issues and questions of fact judged first-hand by an Article III judge rather than by a bankruptcy judge. They have instead received only a second-hand determination by an Article III judge applying the clearly erroneous standard. Manifestly, this is less than the Constitution requires.

Moreover, this is not an isolated incident. The Courts of Appeals, even in light of this Court's decision in Granfinanciera, are reaching conflicting conclusions on the constitutionality of the

private rights arising out of core proceedings. These conflicting views are creating confusion for litigants and the courts in attempting to determine the extent to which a non-Article III tribunal can adjudicate matters of private rights.

For example, the Court of Appeals in the instant case has concluded that bankruptcy courts have authority under Article III to hear fraudulent conveyance actions. The Court of Appeals then goes on to state that "[o]ther courts have similarly concluded that the bankruptcy courts have authority to preside over preferential and fraudulent transfer proceedings." 4 F.3d at 1561; A21 - A22. This conclusion is not one easily reached.

In support of this proposition, the Court of Appeals cites, inter alia, to In re Mankin, 823 F.2d 1296 (9th Cir. 1987) cert.

denied, 485 U.S. 1006 (1988). In that case, the Ninth Circuit upheld the jurisdiction of the bankruptcy court to avoid an allegedly fraudulent conveyance because, in its pre-Granfinanciera judgment, the designation of a fraudulent conveyance as a core proceeding was justified. Significantly, the In re Mankin court noted that its finding of bankruptcy court jurisdiction in a fraudulent conveyance action would be altered if the restructuring of debtor-creditor relations is not a public right.

> Of course the fact that this suit has properly been designated as a core proceeding would not justify the Bankruptcy Court's jurisdiction over the matter if we were to find that . . . restructuring of debtor-creditor relations is not a public right.

823 F.2d at 1307. It is therefore logical that the Ninth Circuit would have held differently in light of this Court's holding in Granfinanciera, that fraudulent conveyance

actions are matters involving private rights. Granfinanciera, 492 U.S. at 55.[6]

In contrast to the Tenth Circuit's opinion below, the Second Circuit Court of Appeals recognized that matters of private rights must be tried under the auspices of an Article III court. In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993) (holding that the adjudication of a contract provision was a state law action which is to be adjudicated by an Article III court).[7]

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[6] However, in In re Intl Nutronics, 3 F.3d 306, 310 (9th Cir. 1993) that Court suggested that the core/non core distinction is determinative in that it "ensures that the bankruptcy courts will not encroach impermissibly in the province reserved by the Constitution to Article III courts."

[7] But the Second Circuit appears irresolute on this issue. See In re Ben Cooper, Inc., 896 F.2d 1394, 1403 (2nd Cir. 1990) (in which the Court assumed, "for the sake of this appeal that § 157(b) passes muster under Article III," as a predicate to holding that jury trials in core proceedings in the bankruptcy court do not violate Article III).

The Tenth Circuit, in the case at issue, which was decided on the same day as In re Orion Pictures Corp., held that the bankruptcy court had jurisdiction under Article III to adjudicate the action, "notwithstanding the fact that . . . fraudulent transfer proceedings may involve private rights. . . " In re Investment Bankers, Inc., 4 F.3d at 1562; A22. Still other Courts of Appeals have reached similar conclusions. See, e.g., In re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987)(upholding bankruptcy court jurisdiction to hear a breach of contract claim because it was held to be a core proceeding).

The frustration resulting from the confusion among the Circuit Courts of Appeals is reflected by the Eleventh Circuit in the case of In re Davis, 899 F.2d 1136, 1140, n.9. (11th Cir. 1990) cert. denied, 498 U.S.

981 (1991). The In re Davis opinion suggests that "the assumption underlying the 1984 amendments is that Article III is not violated by the resolution of core bankruptcy proceedings in the non-Article III bankruptcy courts." In re Davis at 1140. However, the Court observes "[t]hat assumption is open to serious question," Id. at 1140, n.9, and goes on to provide the following discussion of cases illustrating the widespread confusion which exists regarding whether private right claims must be adjudicated by an Article III court:

> While Supreme Court dicta in two cases following Northern Pipeline seemed to take a narrow view of that decision, see Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584, 105 S.Ct. 3325, 3334, 87 L.Ed.2d 409 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-53, 106 S.Ct. 3245, 3256-58, 92 L.Ed.2d 675 (1986), the Court's more recent decision in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989),

appeared to adopt the analysis of the Northern Pipeline plurality, and cast doubt on the constitutionality of the bankruptcy courts' authority, under § 157(b), to adjudicate certain "core" proceedings without the parties' consent. Granfinanciera held that a defendant who has not submitted a claim against a bankruptcy estate has a Seventh Amendment right to jury trial in a fraudulent-conveyance action brought by a trustee. The Court also strongly suggested - although it specifically avoided holding - that fraudulent-conveyance and voidable-preference actions under 11 U.S.C.A. §§ 547-548 are "private-right" claims which "must be tried under the auspices of an Article III court." 109 S.Ct. at 2796; see generally id. at 2794-98, 2802. The Courts of Appeals have generally held to the contrary. In re Davis at 1140, n.9.[8]

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[8] In light of these differing opinions the In re Davis court must have felt relief that it did not need to enter this quagmire of conflicting opinions and could instead state that "[t]his difficult issue is not raised in this case, and so, of course, we express no view as to is merits." In re Davis at 1140, n.9.

The case at issue presents an opportunity for this Court to resolve the question of whether Congress, by classifying a claim involving private rights as a core proceeding, can circumvent the requirement that such claims are to be adjudicated by a tenured judge under Article III of the Constitution.

B. By Filing a SIPA Proof of Claim with a SIPA Trustee, Petitioners did not Subject Themselves to a Title 11 Claims Allowance Process, and in Any Event, They Remain Entitled to an Article III Adjudication of Their Private Rights.

1. A SIPA Proof of Claim is Functionally Distinct from a Proof of Claim Under Title 11.

The respondents persuaded the appellate courts below that the written claim filed by petitioners with the SIPA trustee somehow operated as consent by petitioners to the jurisdiction of the bankruptcy court. 4 F.3d

at 1561; A22. This conclusion overlooks the important differences between a SIPA claim and a more formal Title 11 proof of claim.[9]

Section 78fff-2(a) of SIPA governs the filing of a SIPA statement of claim. Section 78fff-2(a)(1) provides that notice of a Title 15 SIPA proceeding is given by the SIPA trustee and not by the bankruptcy court. By contrast, pursuant to Bankruptcy Rule 2002(f), notices under Title 11 are issued by the clerk of the bankruptcy court or a person directed by the court. Significantly, under Section 78fff-2(a)(2), the SIPA claim is filed with the SIPA trustee, and is never filed with the bankruptcy court. Title 11 proofs of claim must be filed with the

---

[9] It also neglects the fact that the disputed SIPA proof of claim was filed with the Trustee prior to the 1984 changes in the bankruptcy court system discussed, supra, and that, following enactment of BAFJA, petitioners clearly disputed the bankruptcy judge's authority to decide this case.

bankruptcy court pursuant to 11 U.S.C. § 501. Even the time limits for filing SIPA claims are different from those under Title 11. Indeed, it has been determined that "Congress contemplated and intended that certain provisions of the [Bankruptcy] Code not apply to SIPA cases." In re Government Securities Corporation, 95 B.R. 829 (S.D. Fla. 1988) (holding that Title 11 provisions permitting a bankruptcy judge to extend the time for filing a proof of claim, were not applicable to claims filed with the trustee in SIPA cases.)

Simply put, the claims process in a SIPA action is governed by SIPA and not by Title 11. Accordingly, a SIPA claim cannot be construed as a consent to the equitable jurisdiction of a bankruptcy court when (a) the SIPA claims process is not subject to the control and supervision of the bankruptcy

judge, and (b) the SIPA claim is not even filed with the bankruptcy court, but with a SIPA trustee.

2. The Court of Appeal's Ruling Unfairly Deprives Petitioners of any Opportunity to Have Their Private Rights Adjudicated by an Article III Tribunal.

The Court of Appeals upheld the district court's finding that petitioners violated the requirements of 11 U.S.C. § 329(a), which mandates disclosure of fees paid to an attorney representing a debtor. The Court of Appeals reasoned that "the disclosure requirements imposed by § 329 are 'mandatory not permissive'" and went on to state that "... an attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services rendered on behalf of the debtor". 4 F.3d at 1565; A42 - A43, citing In re Bennett, 133 B.R. 374, 378-379 (Bankr. N.D. Texas 1991).

The Court of Appeals held that "by violating § 329, the appellants forfeited any right to the fees received from IBI." 4 F.3d at 1566; A46. The result of this finding is that if petitioners wanted to ensure that their fees would not be subject to disgorgement under § 329, they should have filed the necessary disclosure with the bankruptcy court. However, by filing with the bankruptcy court, petitioners could be deemed, under Katchen v. Landy, 382 U.S. 323 (1966) and its progeny, to have submitted to the equitable jurisdiction of the bankruptcy court since it submitted itself to the process of allowance and disallowance of claims.

In effect, petitioners are caught in a "Katchen-22." That is, if they do not file a § 329 disclosure with the bankruptcy court, the bankruptcy court has the power to force

them to disgorge their fees. If they do file a § 329 disclosure with the bankruptcy court, according to the Court of Appeals, they subject themselves to the court's equitable jurisdiction and lose their Constitutional rights to a jury trial and to be heard by an Article III judge.

3. Even if Petitioners Have Filed a Proof of Claim, They are Entitled to Have an Article III Judge Hear and Determine Their Case.

The Court of Appeals concluded that "the bankruptcy court's determination of the trustee's preference and fraudulent conveyance claims did not violate Article III." 4 F.3d at 1561; A18 - A19. As support for this position, the Court of Appeals cited, inter alia, to this Court's opinion in Katchen v. Landy, 382 U.S. 323 (1966).

The issue in Katchen was characterized by this Court as follows: "Whether a

bankruptcy court has summary jurisdiction to order the surrender of voidable preferences asserted . . . by the Trustee in response to a claim filed by the creditor who received the preferences." 382 U.S. at 325. (Emphasis added.) This Court, in rejecting the creditor's argument that a finding in favor of summary jurisdiction would violate the Seventh Amendment right to trial by jury in actions at common law, reasoned that "since the proceedings of bankruptcy courts are inherently proceedings in equity, there is no Seventh Amendment right to a jury trial for determination of objections to claims . . . " 382 U.S. 336-337. (Citations omitted.)

The effect of Katchen is to convert legal claims into equitable claims as a part of the process of allowing claims, if the creditor has filed a proof of claim with the bankruptcy court. Thus, Katchen is a Seventh

Amendment case, which does not address a litigant's entitlement to have a private right tried by an Article III judge. As was noted by this Court in Marathon, and discussed in In re L.T. Ruth Coal Co., 66 B.R. 753 (Bkrtcy. E.D. Ky. 1986):

> In Katchen . . . there was no discussion of the Article III issue. Moreover, when Katchen was decided, the 1973 Bankruptcy Rules had not yet been adopted, and the District Judge, after hearing the report of the Magistrate [Referee], was free to "modify it or . . . reject it in whole or in part or . . . receive further evidence or recommit it without instructions."[10]

66 B.R. at 768, quoting Marathon, 458 U.S. at 79, n. 31. Significantly, then, at the time Katchen was decided, the district court essentially was permitted to review the

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[10] Katchen was decided under the Bankruptcy Act of 1898, which provided in Section 38 of such Act that any ruling by the bankruptcy referee was "subject always to a review by the [district court] judge."

findings of the bankruptcy referee de novo. Under the Tenth Circuit's ruling below, however, the protection of de novo review is eviscerated and petitioner's private right, as a "core proceeding," is deemed triable by a non-Article III judge, and is subject to reversal by an Article III judge only if the findings of fact are deemed "clearly erroneous."

As stated by the Court of Appeals:

> Accordingly, notwithstanding the fact that preferential and fraudulent transfer proceedings may involve private rights, we hold that the bankruptcy court had jurisdiction under Article III to adjudicate the trustee's suit.

4 F.3d at 1562; A22.

The Court of Appeals also supports its finding by relying on this Court's decision in Granfinanciera v. Nordberg, 492 U.S. 33 (1989), which, not unlike Katchen, also involved the issue of a Seventh Amendment

right to a jury trial. In Granfinanciera, this Court held that a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial under the Seventh Amendment when sued by a bankruptcy trustee for recovery of an allegedly fraudulent conveyance.

Granfinanciera likewise does not stand for the proposition that the filing of a proof of claim divests petitioners of their right to have an issue of private right adjudicated before an Article III judge. This Court stated as follows:

> . . . if a statutory cause of action such as respondents' right to recover a fraudulent conveyance under 11 U.S.C. §548(a)(2) is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court 'lacking the essential attributes of the judicial power.'

492 U.S. at 53. Granfinanciera and Katchen, as Seventh Amendment cases, simply do not

address fully the jurisdictional issue of whether petitioner is entitled to an Article III adjudication in equity and the Tenth Circuit improperly reads those decisions to deny petitioners an opportunity to be heard by an Article III tribunal.[11]

Similarly, this Court in Langenkamp v. Culp, 498 U.S. 42 (1990), again addressed the Seventh Amendment issue. In Langenkamp, this court, quoting Granfinanciera, held that "[a]ccordingly, 'a creditor's right to a jury

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[11] This Court, in Granfinanciera, explicitly refrained from addressing the extent of the constitutional authority for the bankruptcy courts to hold jury trials. 109 S.Ct. at 2802. Currently, there is a split of authority among the Courts of Appeals concerning whether bankruptcy courts can hold jury trials. Compare In re Baker & Getty Fin. Serv. Inc., 954 F.2d 1169 (6th Cir. 1992); In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990); In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990) (bankruptcy court cannot hold jury trial); with In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), cert. denied, 498 U.S. 1 (1991).

trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate.'" 498 U.S. at 45. In Langenkamp, the creditor had submitted a bankruptcy proof of claim and was therefore denied the right to a jury trial.

The instant case goes one step further than Langenkamp. The Court of Appeals has denied debtor's counsel the right to an Article III adjudication of its a private right, by construing Section 329 as depriving a debtor's attorney automatically of such right, notwithstanding the fact that the attorneys, here, did not file a disclosure under that statute. The Court of Appeals substantiates its reasoning by noting:

> Although the bankruptcy court could have ordered the appellants to disgorge the payments it received . . . directly under § 329, we do not believe the bankruptcy court

> abused its authority in reaching the same result by using § 329 as a basis for approving the trustee's claims under §§ 547 and 548. 4 F.3d at p. 1566; A46 - A47.

The SIPA trustee attacked the payments to petitioners as being voidable under Sections 547 and 548. Sections 547 and 548 govern the recovery of preferences and fraudulent conveyances, respectively. This Court's ruling in Granfinanciera makes clear that these actions are matters of private right, despite Congress' "taxonomic" classification of these proceedings as core. 492 U.S. at 61. The mere fact that Section 329 may also have governed those payments does not bear on the bankruptcy court's authority to adjudicate the alleged preferential and fraudulent transfers.

While the bankruptcy court may be at liberty to pursue whatever sanction it might consider appropriate for lawyer non-compliance with Section 329, it should not be permitted to use that section as a basis for adjudicating a private right over which it would not otherwise have jurisdiction.

In sum, this petition presents important questions concerning petitioners' right to be heard before an Article III court. Petitioners' filing of a SIPA proof of claim with the SIPA trustee ought not be interpreted to confer jurisdiction of petitioners' "private rights" upon a bankruptcy court. This is particularly so where the requirements of 11 U.S.C. § 329 (and other statutory provisions) would constantly place litigants in peril of abandoning critical Constitutional rights.

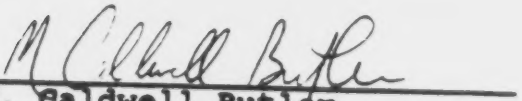
The cases relied on by the appellate courts, which address the filing of proofs of claims with the bankruptcy court as waiver of Seventh Amendment rights, pertain to the litigant's consent to proceed in equity. They do not suggest that such a filing constitutes abandonment of the litigant's rights to be heard by an Article III judge. This petition squarely presents that question to this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GILBERT K. DAVIS AND
DAVIS, GILLENWATER & LYNCH



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CERTIFICATE OF MAILING

I, M. Caldwell Butler, do hereby certify that I mailed prepaid, a true and correct copy of the foregoing on this the 14 day of December, 1993 to the following: Mr. Theodore H. Focht, Ms. Josephine Wang, Mr. Michael E. Don, counsel for Securities Investor Protection Corporation, Office of General Counsel, 805 15th Street, N.W., Suite 800, Washington D.C. 20005-2207; and Ms. Adrienne H. Benavidez, Ms. Maria J. Flora Gorsuch, Kirgis, Campbell, Walker & Grover, counsel for James H. Turner, Trustee, 1401 17th Street, Suite 1100, P.O. Box 17180, Denver, CO 80217.0180.

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M#191012

93-956
No. _____

Supreme Court, U.S.
FILED
DEC 16 1993
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re: INVESTMENT BANKERS, INC.

Debtor.

No 92-1121

JAMES H. TURNER, Trustee

Plaintiff-Appellee,
v.

DAVIS, GILLENWATER & LYNCH
GILBERT K. DAVIS,
individually and as a partner
of Davis, Gillenwater & Lynch
a partnership

Defendants-Appellants,
and
O'CONNOR & HANNAN, a partnership

Defendant

SECURITIES INVESTOR PROTECTION CORPORATION,

Appellee.

Appeal from the United States
District Court
for the District of Colorado
(D.C. No. 91-C-1474)

M#191132

The appellee/trustee, James H. Turner, was appointed as the trustee for the debtor, Investment Bankers, Inc. ("IBI"), pursuant to a liquidation proceeding commenced under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78 aaa et seq. The trustee subsequently commenced this action in the bankruptcy court against the defendants/appellants, Davis Gillenwater & Lynch and Gilbert K. Davis, to recover payments of $11,858.00 and $25,000.00 that IBI made to appellants immediately prior to the commencement of the liquidation proceedings. We conclude that the bankruptcy court and the bankruptcy judge of that court had jurisdiction over the trustee's suit, and we affirm the ruling that the payments to

the appellants were invalid as preferential and fraudulent transfers. Additionally, we affirm the ruling that the trustee was entitled to pretrial interest.

FACTS

Prior to the SIPA liquidation proceedings, IBI was a securities broker-dealer incorporated in the State of Colorado. On May 8, 1981, IBI became the principal underwriter of 20 million shares of Chipola Oil Corporation ("Chipola") common stock. As a result of a sudden surge in the price of Chipola stock, the Securities & Exchange Commission ("SEC") began to investigate the existence of a stock manipulation scheme, and suspended trading in Chipola

stock on July 2, 1981. This suspension caused a devaluation of the shares of Chipola stock still possessed by IBI, and prompted an inquiry from the SEC about IBI's continued compliance with the SEC's net capital requirements. IBI immediately sent a telegram to the SEC stating that it was ceasing its business operations as of July 3, 1981 until its capital complied with the SEC's net capital requirements.

On July 8, 1981, IBI asked Gilbert K. Davis, a partners in the Virginia based law firm of Davis, Gillenwater & Lynch to represent it and two of its directors, Richard Belknap and William Chandler, in connection with the SEC';s stock manipulation investigation and its suspension of trading in Chipola stock. Davis agreed to fly to Colorado to

consult with IBI and its directors in exchange for a fee of $10,000.00. Davis spent two days consulting in Colorado, during which time IBI agreed to give Davis a $25,000.00 retainer for additional work to be performed by Davis.

On July 10, 1981, the SEC filed suit against IBI, Belknap, and Chandler, seeking to enjoin them from engaging in further securities transactions wile IBI was in violation of the SEC's net capital requirements. The same day, the Securities Investment Protection Corporation ("SIPC") filed suit against IBI under the SIPA, seeking the appointment of a trustee for the purpose of liquidating IBI. The SIPC's complaint alleged that IBI was in danger of failing to meet its obligations to its customers

as a result of its violation of the SEC's net capital requirements.

Both actions were consolidated in the District Court of Colorado, and a hearing was held on July 10, 1981 at which IBI was represented by Davis. At the conclusion of this hearing, the district court entered a consent order with respect to the SEC action enjoining IBI from doing business and from disbursing funds other than for rent, utilities, and existing employee's salaries. The district court deferred action on the SIPC's request for the initiation of liquidation proceedings.

Just prior to the July 10, hearing, Davis received two checks from IBI that he immediately converted into cashiers checks. The first check, in the amount of $11,858, covered Davis' $10,000 legal

fee and $1,858 in expenses for the two days he spent consulting in Colorado. The second check, in the amount of $25,000, constituted payment of the retainer that IBI had negotiated with Davis for legal services.

On July 14, 1981, the SEC renewed its application for injunctive relief against IBI, alleging that the debtor had issued checks in violation of the July 10 consent order. The following day, the district court approved the SIPC's application for a protective decree and appointed the current trustee to oversee the liquidation of IBI. Following the appointment of the trustee, the liquidation proceeding was removed to the bankruptcy court. With the commencement of the liquidation proceedings, the SEC

withdrew its renewed application for injunctive relief against IBI.

On September 1, 1981, Davis filed a written claim with the trustee against IBI's estate for a cash credit balance and some securities. The trustee issued no determination of the claim. Rather, on January 19, 1982, the trustee commenced the instant suit against Davis and Lynch in the bankruptcy court seeking the return of the $36,858 that IBI paid to Davis on July 10, 1981. The trustee claimed that the payment of $11,585 was voidable as a preference under 11 U.S.C. § 547[1] and that the payment of $25,000

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[1] 11 U.S.C. § 547 provides in relevant part:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (continued...)

was voidable as a fraudulent transfer under 11 U.S.C. § 548[2]. The appellants

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[1](...continued)

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made --
(A) on or within 90 days before the date of the filing of the petition;
. . .

(5) that enables such creditor to receive more than such creditor would receive if --
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

[2] 11 U.S.C. § 548 provides in relevant part:

(continued...)

[2](...continued)

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonable equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably

(continued...)

filed two counterclaims seeking reimbursement for a hotel bill in the amount of $469.95 incurred by Davis while consulting with IBI in Denver and for legal fees in the amount of $13,819.32 for services rendered to IBI, Belknap and Chandler.

The trustee's claim proceeded to trial on August 7, 1984 and concluded on July 19, 1985 after several lengthy continuances. The bankruptcy court rejected the argument that Article III prevented it from hearing actions seeking recovery of preferences and fraudulent conveyances and it also rejected the

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[2](...continued)
small capital; or
(iii) intended to incur, or believed that the debtor would incur, debts that would go beyond the debtor's ability to pay as such debts matured.

argument that the bankruptcy judge was appointed in violation of Article II. However, the bankruptcy court did conclude that it lacked statutory jurisdiction to entertain suits brought under the aegis of the SIPA. Notwithstanding its conclusion that it lacked jurisdiction, the bankruptcy court proceeded to the merits of the trustee's claim and held that the $11,858 payment to Davis constituted a preference under 11 U.S.C. § 547 and the $25,000 payment to Davis constituted a fraudulent transfer under 11 U.S.C. § 548.

The trustee appealed the bankruptcy court's decision to the district court. In its order of October 5, 1989, the district court reversed the bankruptcy court's determination that it lacked jurisdiction and affirmed its

determination that the two payments to Davis were voidable under 11 U.S.C. §§ 547 and 548. The trustee subsequently moved the court to amend its order for an award of prejudgment interest, and in an order dated May 15, 1990 the court referred this question to the bankruptcy court. The bankruptcy court subsequently determined that the trustee was entitled to prejudgment interest. The appellants appealed the bankruptcy court's determination on March 31, 1992. The appellants subsequently filed the current appeal.

D I S C U S S I O N

The appellants presented the following claims on appeal: 1) the bankruptcy court lacked jurisdiction under Article III to hear actions to recover preferences and fraudulent

transfers, 2) the bankruptcy judge lacked authority to preside over the trustee's suit because he was appointed in violation of Article II, 3) the bankruptcy court lacked statutory jurisdiction to hear cases under the SIPA, 4) the bankruptcy court erred in finding that the $11,858 and $25,000 payments by IBI to the appellants were invalid as preferential and fraudulent transfers respectively under 11 U.S.C. §§ 547 and 548, and 5) the bankruptcy court erred in awarding prejudgment interest to the trustee.

When reviewing challenges to the decisions of the bankruptcy courts, we apply the same standard of review as the district court. Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1174 (10th Cir. 1989). Accordingly, the

bankruptcy court's findings of fact are reviewed under a clearly erroneous standard while the court's conclusions of law are subject to de novo review. Id.; Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988).

I. The Jurisdiction of the Bankruptcy Court Under Article III

Title 15 United States Code § 78fff(b) states that a liquidation proceeding under the SIPA is to be conducted "in accordance with, and as through it was being conducted under . . . Title 11." Title 28 U.S.C. § 157(b)(1) states that bankruptcy courts "may hear and determine . . . all core proceedings arising under title 11." Section 157(b)(2) defines a core proceeding to include "proceedings to

determine, avoid or recover preferences" and "proceedings to determine, avoid, or recover fraudulent conveyances." Pursuant to these provisions, the trustee brought suit against the appellants in the bankruptcy court seeking to avoid IBI's payment of attorney's fees to the appellants as preferential and fraudulent transfers. The appellants argue that the bankruptcy court lacked jurisdiction under Article III to hear the trustee's suit because the trustee's claim involved private rights that may only be adjudicated by Article III tribunals.[3]

In Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), the Supreme Court defined a balancing test for determining whether a particular

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[3] Bankruptcy courts are non-Article III tribunals. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50 (1989).

jurisdictional grant to a non-Article III court was constitutional. The Court stated that the critical question is whether the jurisdictional grant "impermissible threatens the institutional integrity of the Judicial Branch," taking into account "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." 478 U.S. at 851.

In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54 (1989), the Court stated,

"[t]he Crucial question, [determining whether Congress may commit adjudication of a statutory cause of action to a non-Article III tribunal] in cases not involving the Federal Government, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency regulation with limited involvement by the Article III judiciary.'" (quoting Thomas v. Union Carbide Agri. Prod. Co., 473 U.S. 568, 593-4).

Applying the Schor test to the instant case, we conclude that the bankruptcy court's determination of the trustee's preference and fraudulent

conveyance claims did not violate Article III. First, proceedings involving preferential and fraudulent transfers are "proceeding[s] of the type traditionally adjudicated by non-article III bankruptcy Courts," In re Comm. of Unsecured Creditors of F.S. Communications Corp., 760 F.2d 1194, 1199 (11th Cir. 1985), at least where, as here, the party receiving the alleged preference or fraudulent conveyance has filed a claim against the debtor's estate. See Katchen v. Landy, 382 U.S. 323, 333-35 (1966). Second, the right of a bankruptcy trustee to void preferences and fraudulent transfers is a congressionally created right pursuant to Congress' authority under Article I Section 8 of the Constitution to provide for uniform bankruptcy laws. In the Matter of Associated Grocers of Nebraska

Cooperative, Inc., 62 B.R. 439, 445 (D. Neb. 1986). In Northern Pipeline Const. Co. v. Marathon Pipe Line, the Supreme Court distinguished between state created rights and rights of congressional origin, holding that Congress had much greater discretion to assign the latter to non-Article III courts. See 458 U.S. 50, 83-84 (1982); In Re Mankin, 823 F.2d 1296, 1308-09 (9th Cir. 1987). Finally, since the assets of the bankruptcy estate are mustered in the bankruptcy court, a strong reason exists for enabling the bankruptcy court to preside over trustee actions designated to augment the estate. See In Re Great Am. Mfg. and Sales, Inc., 129 B.R. 633, 636 (C.D. Cal. 1991). Absent such authority, the bankruptcy proceedings would have to be stayed until the preference and fraudulent conveyance

actions could be adjudicated in the district court, "with all the delay and expense that course would entail." Katchen, 382 U.S. at 229.

Our conclusion that the bankruptcy court had authority over the trustee's suit is consistent with our prior decision in John E. Burns Drilling Co. v. Central Bank of Denver, 739 F.2d 1489, 1494 (10th Cir. 1984), where we concluded that the bankruptcy courts had authority under Article III to hear proceedings involving preferences. Although we decided this case prior to Schor, we stressed that such proceedings were very different from the type of proceedings that Northern Pipeline held must be adjudicated by an Article III court. Id. Other courts have similarly concluded that the bankruptcy courts have authority

to preside over preferential and fraudulent transfer proceedings. See, e.g., In re Mankin, 823 F.2d 1296, 1301-1310 (9th Cir. 1987); In the Matter of Associated Grocers, 62 B.R. at 442-47; cf. In re Davis, 899 F.2d 1136, 1140 n.9 (11th Cir. 1990) (suggesting that the bankruptcy courts may have authority to preside over fraudulent conveyance and preference actions under Article III only where the alleged recipient of the fraudulent conveyance or preference has filed a claim against the debtor's estate). Accordingly, notwithstanding the fact that preferential and fraudulent transfer proceedings may involve private rights, we hold that the bankruptcy court had jurisdiction under Article III to adjudicate the trustee's suit.

II. The Constitutionality of the Bankruptcy Judge's Appointment

In 1978, Congress overhauled the bankruptcy courts by replacing the old referee system with a new Article I bankruptcy court of substantially expanded jurisdiction. The 1978 Act provided that bankruptcy judges would be appointed to 14 year terms by the nomination of the President and the consent of the Senate. The Act established a 4 and 1/2 year transition period, to end on March 31, 1984, during which time the existing bankruptcy courts were to be continued. Section 404(b) of the 1978 Act extended the term of bankruptcy judges serving prior to the Act until the end of the transition period or when their "successors take

office." Pub. L. No. 95-598, 92 Stat. 2683-84 (1978).[4]

As noted previously, the Supreme Court in Northern Pipeline struck down the jurisdictional grant of authority provided to the bankruptcy courts by the 1978 Bankruptcy Reform Act. In response, Congress adopted the Bankruptcy Amendments and Federal Judgeship Act ("BAFJA") on July 10, 1984. Prior to the adoption of BAFJA, Congress extended the transition period established by the 1978 Act until June 27, 1984. BAFJA granted the bankruptcy courts jurisdiction over

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[4] Section 404 (b) provides in relevant part:

> The term of a referee in bankruptcy who is serving on the date of enactment of this Act is extended to and expires on March 31, 1984 or when his successor takes office.

all core bankruptcy matters and established the courts as adjuncts to the district court for all non-core bankruptcy matters. Section 121 (e) provides that "[t]he term of office of any bankruptcy judge who was serving on June 27, 1984, is extended to and shall expire at the end of the day of enactment of this Act." P.L. No. 98-353, 98 Stat. 346 (1984). Section 106(a) provided that "the term of office of a bankruptcy judge who is serving on the date of enactment of this Act is extended to and expires four years after the date of such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later." P.L. No. 98-353, 98 Stat. 342 (1984).

The appellant argues that § 106(a) constituted an appointment of bankruptcy

judges in violation of Article II.[5] According to the appellant, the terms of the bankruptcy judges serving during the transition period elapsed on June 27, 1984. Thus, when BAFJA was adopted on July 10, 1984, these positions were all vacant. By continuing the judges in office under the authority of § 106(a), appellant argues, BAFJA in essence resulted in a unilateral congressional appointment of these judges that bypassed Article II's requirement of presidential nomination.

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[5] The appointments clause states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. Art. II, Sec. 2, cl. 2.

The appellants' argument has been rejected by every court that has considered it. See e.g., In re Lombard-Wall, Inc., 48 B.F. 986, 993 (S.D. N.Y. 1985); In re Moody, 46 B.R. 231, 233 (M.D. N.C. 1985); In re Tom Carter Enters., Inc., 44 B.R. 605, 606-07 (C.D. Cal. 1984); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), dismissed in part on other grounds, 791 F.2d 712 (9th Cir. 1986); In re Southern Indus., 66 B.R. 357-59; In the Matter of Baldwin-United Corp., 48 B.R. 49, 53 (Bankr. S.D. Ohio, 1985). The seminal case in this regard is In re Benny. In that case, the court based its conclusion that § 106(a) of BAFJA did not result in an unconstitutional appointment of bankruptcy judges on both § 404(b) of the 1978 Act and § 121(e) of BAFJA.

Section 404 (b) of the 1978 Act, the Benny court argued, contained a holdover provision which expressly authorized the bankruptcy judges to serve beyond the expiration of the transition period. This holdover provision, according to the Court, consisted of a second part of the disjunctive contained in § 404(b) that provided that the bankruptcy judges were to serve until their successors were appointed. In light of this holdover provision, the Benny court concluded, the bankruptcy judges were still lawful office holders at the time BAFJA was adopted, notwithstanding the expiration of the transition period on June 37, 1984. Thus, rather than constituting an unlawful appointment of these judges, § 106(a) merely served to extend the terms of the existing bankruptcy judges,

similar to § 404(b) of the 1978 Act. See id. at 586-88.[6]

Alternatively, the court in Benny held that § 106(a) of BAFJA did not result in an unconstitutional appointment of judges in light of § 121(e) of the same act. The Court concluded that § 121 (e) constituted a holdover provision which extended the terms of the bankruptcy judges until the adoption of BAFJA. See 44 B.R. at 588-92. The Court dismissed the contention that § 121(e) was invalid because it was adopted after the transition period had expired.

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[6] The appellants do not dispute that Congress may, consistent with Article II, unilaterally extend the terms of United States officers who have previously been appointed to their posts in accordance with Article II. See In re Tom Carter, 44 B.R. at 607 ("[T]he Supreme Court has consistently rejected Appointments Clause attacks on legislation changing the terms and duties of office.").

Retroactive legislation in and of itself, the court argued, was not antithetical to the strictures of the appointments clause. Rather, the critical inquiry was whether the legislation impermissible intruded on the inherent authority of the executive branch. The court concluded that § 121(e) did not impermissible intrude on the president's appointment power and therefore affected a valid retroactive extension of the bankruptcy judge's terms of office. Id. at 592-98; see also In re Tom Carter, 44 B.R. at 608 ("[Section 121(e)'s] retroactive extension of office of bankruptcy judge can in no principled way be said to encroach upon the separation of powers principles embodied in said Appointments Clause").

Although plausible arguments can be raised in response to the reasoning adopted by the Benny court, we are ultimately persuaded that this reasoning is correct. Accordingly, for substantially the same reasons advanced in Benny, we reject the appellants' claim in the instant case that the bankruptcy judge was without authority to hear the trustee's suit because he was appointed in violation of Article II.

III. The Jurisdiction of the Bankruptcy Court Under the SIPA

The appellants' final jurisdictional claim is that the bankruptcy court lacked statutory jurisdiction to try cases brought under the SIPA. The bankruptcy court agreed that it lacked jurisdiction but the district court reversed on

appeal. We find that the bankruptcy court possessed statutory jurisdiction over the trustee's suit on the basis of § 78eee(b)(4) of the SIPA.

Section 78eee(b)(4) is entitled "Removal to bankruptcy Court" and provides that "[u]pon the issuance of a protective decree . . . the [district] court shall forthwith order the removal of [a SIPA] liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under Title 11."[7] The

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[7] Section 78eee(b)(4) provides in full:

> Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under Title
>
> (continued...)

appellants argue that this section does not confer jurisdiction on the bankruptcy courts because under 28 U.S.C. § 1334(a), adopted as part of BAFJA in response to Northern Pipeline, it is the district courts and not the bankruptcy courts that currently have jurisdiction over title 11 cases.[8] Thus, the appellants conclude, § 78eee(b)(4)'s statement that the district court is to remove a SIPA proceeding to the court having jurisdiction over title 11 cases cannot

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[7](...continued)
11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made.

[8] 28 U.S.C. § 1334(a) provides that "the district court shall have original and exclusive jurisdiction of all cases under title 11."

be read as authorizing removal of SIPA proceedings to the bankruptcy courts.

We reject this reading of § 78eee(b)(4) because it would lead to an absurd result clearly at odds with the intention of Congress. See United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992) ("[U]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control."); Resolution Trust Corp. v. Westgate Partners, Ltd., 937 F.2d 526, 529-30 (10th Cir. 1991) (a court is to apply the plain language of a statute unless "a plain language interpretation would lead to an outcome so 'absurd' that Congress clearly could not have intended such an outcome"). The SIPA specifies that it is the district courts that have

exclusive jurisdiction over liquidation proceedings commenced by the SIPC. See 15 U.S.C. § 78aa. Thus, to interpret the recipient of the removal action to in § 78eee(b)(4) as also being a district court would lead to a twofold absurdity: from a functional standpoint, it would require the district courts to remove SIPA liquidation proceedings to themselves, and from a linguistic standpoint, it would render meaningless § 78eee(b)(4)'s reference to "the court in the same judicial district," because there is only one district court in each district.

Generally, in determining how to avoid an absurdity generated by the plain language of a statute, a court is to look to congressional intent. See United States v. Ron Pair Enters., Inc., 489

U.S. 235, 242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). In the instant case, we conclude, based on the legislative history of § 78eee(b)(4) and the language of § 78fff(b), that Congress intended § 78eee(b)(4) to authorize the removal of SIPA liquidation proceedings to the bankruptcy courts.

The legislative history of § 78eee(b)(4) clearly reveals that Congress intended to confer jurisdiction on the bankruptcy courts to preside over SIPA liquidation proceedings. The precursor to the current version of § 78eee(B)(4) specifically provided that the district court "may, at any stage of the [SIPA] proceeding, refer the proceeding to a referee in bankruptcy to hear and determine any or all matters."

§ 7(b)(4), Pub. L. No. 95-283, 92 Stat. 257 (1978) (amended 1979). In 1979, this provision was subsequently altered to its current form to conform it to the terminology employed by the 1978 Bankruptcy Reform Act, which expanded the jurisdiction of the bankruptcy courts to all cases arising under title 11. See S. Rep. No. 989, 95th Cong., 2d Sess., at 19 (1978), reprinted in, 1978 U.S.C.C.A.N. 5787, 5804. Accordingly, it is likely that the drafters of the current version of the § 78eee(b)(4) intended the bankruptcy courts to preside over SIPA liquidation proceedings, and that this intention has become obscured only because of the mere quirk that Congress neglected to amend § 78eee(b)(4) following the Supreme Court's decision in

Northern Pipeline in which it struck down the Bankruptcy Reform Act.[9]

Our conclusion that Congress intended the Bankruptcy courts to preside over SIPA proceedings is supported by the language of 15 U.S.C. § 78fff(b), which provides that "a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." This provision indicates that Congress intended SIPA liquidation proceedings to be treated, in most important respects, identical to a

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[9] That Congress' failure to amend § 78eee(b)(4) is indeed the product of mere oversight rather than deliberate inaction is evidenced by the very title to § 78eee(b)(4), which, as noted above, still reads "Removal to bankruptcy court."

traditional bankruptcy case under title 11. See In re Government Securities, Corp., 972 F.2d 328, 330-31 (11th Cir. 1992). It is of course beyond peradventure that one of the fundamental characteristics of a traditional bankruptcy case under title 11 is that it is conducted by a bankruptcy court. See 28 U.S.C. § 157(a) (conferring jurisdiction on bankruptcy judges to hear "all cases under title 11 and all core proceedings arising under title 11"). It would be truly anomalistic, therefore, for Congress to adopt § 78fff(b) while simultaneously refusing to confer jurisdiction on the bankruptcy courts over SIPA proceedings. Accordingly, we conclude that Congress did intend to confer such jurisdiction on the bankruptcy courts by means of

§ 78eee(b)(4).[10]

IV. The Voidability of the $11,858 and $25,000 Payments.

Although the bankruptcy court concluded that it did not have jurisdiction, the court nevertheless went on to consider the merits of the trustee's suit. It concluded that the $11,858 payment by IBI to the appellants

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[10] The appellants suggest in one statement of their brief that if the bankruptcy court has statutory jurisdiction over SIPA proceedings, this jurisdiction is unconstitutional under Article III. However, since the only proceedings at issue in the instant case are proceedings we need to consider. See Northern Pipeline 458 U.S. at 90 ("[p]articularly in the area of constitutional law such as the Art. III Courts," . . . the Court should decide no more of a constitutional question than is absolutely necessary") (Rehnquist, J., concurring). As we conclude above, the bankruptcy court's authority to hear actions involving preferences and fraudulent transfers does not contravene the strictures of Article III.

was invalid as a preferential transfer under 11 U.S.C. § 547, and that the $25,000 payment was invalid as a fraudulent transfer under 11 U.S.C. § 548. On appeal, the appellants claim that the $11,858 payment fell within the "ordinary course of business" and "contemporaneous exchange for value" exceptions to § 547, and that the $25,000 payment did not constitute a fraudulent conveyance because IBI received equivalent value in exchange for this payment. The bankruptcy court dismissed both of these claims, in part, on the grounds that the appellants failed to comply with the disclosure requirements imposed by 11 U.S.C. § 329(a). We affirm.

Section 329 is a disclosure provision designed to prevent bankruptcy

attorneys from extracting more than their fair share from prospective debtors willing to do whatever is necessary to obtain their counsel of choice and avoid unfavorable bankruptcy proceedings. In re NBI, Inc., 129 B.R. 212, 222 (Bankr. D. Colo. 1991). Section 329(a) provides:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payments or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the course of such compensation.

11 U.S.C. § 329(a). As the foregoing language indicates, the disclosure requirements imposed by § 329 are "mandatory not permissive." In re

Bennett, 133 B.F. 374, 378 (Bankr. N.D. Tex. 1991). Accordingly, an attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services rendered on behalf of the debtor, id. at 379; In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 575 (Bankr. N.D.Tex. 1986), and a court may order an attorney sua sponte to disgorge funds already paid to the attorney, In re Saturley, 131 B.R. 509, 522 (Bankr. D. Me. 1991); In re Kendavis Indu. Int'l. Inc., 91 B.R. 742, 759 (Bankr. N.D. Tex. 1988); In the Matter of Chambers, 76 B.R. 194, 195 (Bankr. M.D. Fla. 1987); In re Chapel Gate, 64 B.R. at 574, 575.

In the instant case, the district court found that the appellants violated § 329 by failing to disclose their

receipt of both the $11,858 payments and the $25,000 payment. We cannot conclude that this finding was clearly erroneous.[11]

Davis testified at trial that he was representing IBI, that he received both of the foregoing payments for such representation, and that the payments were made on the same day that the SIPC filed for liquidation. Furthermore, Davis testified that his initial consultation with IBI, for which he received the $11,858 payments, was in contemplation of a SIPA liquidation

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[11] The appellants do not dispute that § 329 is applicable to SIPA liquidation proceedings by virtue of 15 U.S.C. § 78fff(b), which, as noted above, states that such proceedings are to be conducted "in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11."

proceeding, and that the invoice given by Davis to IBI in exchange for the $25,000 retainer explicitly states that the $25,000 retainer was being given in connection with any "matters . . . involv[ing] . . . SIPC", Addendum to Appellees Br. at 23. Accordingly, we believe the record adequately supports the bankruptcy court's conclusion that the appellants violated § 329 by failing to disclose the payments it received from IBI.

Once the bankruptcy court determined that the appellants violated § 329, the bankruptcy court had the authority to order the appellants to disgorge the two payments they received from IBI. See In re Saturley, 131 B.R. at 522; In re Kendavis Indus. Int'l, Inc., 91 B.R. at 759; In the Matter of Chambers, 76 B.R.

at 195; In re Chapel Gate, 64 B.R. at 575. The appellants do not dispute that the district court could have ordered the return of the payments directly under § 329, but argue that it was error for the court to rely on § 329 in determining whether the payments were invalid under §§ 547 and 548. We disagree. By violating § 329, the appellants forfeited any right to the fees they received from IBI. In re Bennett, 133 B.R. at 379; In re Chapel Gate, 64 B.R. at 575. Although the bankruptcy court could have ordered the appellants to disgorge the payments it received from IBI directly under § 329, we do not believe the bankruptcy court abused its authority in reaching the same result by using § 329 as a basis for approving the trustee's claims under §§ 547 and 548.

V. Prejudgment Interest

The appellants final claim is that the bankruptcy court erred in awarding prejudgment interest to the trustee. We review a bankruptcy court's award of prejudgment interest for abuse of discretion. See In re Bellanca Aircraft Corp., 850 F.2d 1275, 1281 (8th Cir. 1988).

The current bankruptcy code does not specify whether the bankruptcy court may award prejudgment interest to a prevailing trustee. In re Indep. Clearing House Co., 41 B.R. 985, 1014 (Bankr. D. Utah 1984) aff'd and rev'd on other grounds, en banc, 77 B.R. 843 (D. Utah 1987). In the absence of a statutory provision to the contrary, prejudgment interest may generally be

awarded if 1) the award of prejudgment interest would serve to compensate the injured party, and 2) the award of prejudgment interest is otherwise equitable. Anixter v. Home-Stake Production Co., 977 F.2d 1549, 1554 (10th Cir. 1992); FDIC v. Rocket Oil Co., 865 F.2d 1158, 1160 (10th Cir. 1989). In bankruptcy proceedings, the courts have traditionally awarded prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demanded is made or an adversary proceeding is instituted unless the amount of the contested payments was undetermined prior to the bankruptcy court's judgement. See In re Bellanca Aircraft Corp., 850 F.2d at 1281; In re Indep. Clearing House Co., 41 B.R. at 1015.

In the instant case, the award of prejudgment interest to the trustee would unquestionably serve a compensatory purpose. An award of prejudgment interest would serve to compensate the debtor's estate for appellants' use of those funds that were wrongfully withheld from the debtor's estate during the pendency of the current suit. See In re Chase & Sanborn Corp., 127 F.R. 903, 907-10 (Bankr. S.D. Fla. 1991); In re Suburban Motor Freight, Inc., 124 B.R. 984, 1005-06 (Bankr. S.D. Ohio 1990); In re H.P. King Co., 64 B.R. 487, 488-89 (Bankr. E.D. N.C. 1986). Additionally, an award of prejudgment interest would appear to be consistent with the balance of equities.

Finally, there is no dispute that the amount of the contested payment was

clearly determined prior to the bankruptcy courts judgement. The trustee has consistently maintained throughout the course of this action that the full amount of each of the two payments to the appellants by IBI on July 10 were voidable under §§ 547 and 548. Accordingly, we conclude that the district court did not abuse its discretion in awarding the trustee prejudgment interest.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-C-1945

In Re

THE INVESTMENT BANKERS, INC.

Debtor

Adversary Proceeding No. 82-M-0087

JAMES H. TURNER, TRUSTEE

Plaintiff,

v.

DAVIS, GILLENWATER & LYNCH, GILBERT K. DAVIS, individually and as a partner of DAVIS, GILLENWATER & LYNCH and O'CONNOR & HANNAN, a partnership,

Defendants

ORDER

M#191132

CARRIGAN, District Judge.

The Securities Investor Protection Corporation (hereinafter "SIPC") and James H. Turner, as Trustee (hereinafter "Trustee") appealed from a bankruptcy court decision in an adversary proceeding. The SIPC objects to the bankruptcy court's determination that bankruptcy courts do not have jurisdiction over liquidations conducted pursuant to the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq* (hereinafter "SIPA"). The Trustee objects to the bankruptcy court's conclusion that a payments, made by the Investment Banker's, Inc. (hereinafter "IBI") to the law firm of O'Connor & Hannan, was not voidable as a preferential transfer under 11 U.S.C. § 547(b). Davis, Gillenwater & Lynch

appeal the bankruptcy court's conclusion that two payments they received from IBI were voidable as preferential and fraudulent transfers under 11 U.S.C. §§ 547(b) and 548, respectively. O'Connor & Hannan assert that the bankruptcy court correctly determined that the payment they received from IBI fell within the voidable preference exception in 11 U.S.C. § 547(c)(2).

The adversary proceeding was filed by the Trustee during liquidation of IBI in order to recover payments for legal services allegedly voidable as preferential and fraudulent transfers under 11 U.S.C. §§ 547(b) and 548(a)(2), respectively. The Trustee was appointed under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* (hereinafter "SIPA"), and sued under the

above cited sections of the Bankruptcy Code made applicable in a SIPA liquidation by 15 U.S.C. § 78fff(b).

The parties have fully briefed the issues and oral argument would not materially assist my decision. Jurisdiction exists pursuant to 28 U.S.C. § 159 (1988).

Background.

IBI, a Colorado corporation, had acted as a securities broker dealer beginning October 23, 1980. The liquidation proceeding was commenced against the debtor, IBI, by the SIPC, pursuant to authority granted it in the SIPA. The proceeding seeking liquidation of IBI was commenced on July 10, 1981. The application for appointment of a receiver and trustee for the purpose of liquidating IBI was based upon the SIPC's

determination that IBI had failed to meet its obligations to customers imposed by the SIPA. The SIPC also justified its decision to liquidate IBI upon its determination that IBI was in violation of the "net capital" requirements of the Securities Exchange Act of 1934 and Rule 17 CFR 240.15C3-1.

In the order of July 15, 1981, appointing Turner as Trustee, the liquidation proceeding was removed to the United States Bankruptcy Court for the District of Colorado, pursuant to § 5(b)(4) of SIPA, 15 U.S.C. § 78eee(b)(4)(Supp. 1979). After removal to the bankruptcy court, Turner filed a complaint seeking to avoid the transfer of four checks totaling $87,517.80 to the law firms of Davis, Gillenwater & Lynch

and O'Connor and Hannan. Those four checks are as follows:

> (a) Check #13417, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, in the amount of $11,858.00;
>
> (b) Check #13418, dated July 10, 1981, payable to O'Connor & Hannan, in the amount of $25,659.80;
>
> (c) Check #13419, dated July 10, 1981, payable to O'Connor & Hannan Trust Account in the amount of $25,000.00;
>
> (d) Check #13432, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, of Davis, Gillenwater & Lynch, in the amount of $25,000. (Bankruptcy Opinion at 2-4, Record at 303-05)(hereinafter "Op. at, R. at")

The bankruptcy court made the following findings of fact: On July 8, 1981, Gilbert Davis was contacted by a representative of IBI, to represent the debtor and two of its officers, Belknap and Chandler. Davis went to Denver with two other attorneys from Virginia. A

fee of $10,000 was arranged, to be divided among the three attorneys. Conferences were held on July 8 through 10, 1981. The evidence indicates that the parties and these attorneys were aware during the entire course of Davis' representation, of at least the possibility that the SEC would file a liquidation proceeding and seek injunctive relief against IBI in the United States District Court. A $25,000 retainer was agreed upon for further work. The fee included Davis' appearance at the hearing of July 10, 1981 concerning the SEC's application for an injunction and the SIPC's action to liquidate IBI.

The evidence establishes that David received checks #13417 and #13432 at about noon on July 10, 1981. These were

promptly exchanged for cashier's checks at the First National Bank of Denver. Davis claims that he did not learn of the SEC's action, that was commenced the same date, until after he had negotiated these checks.

O'Connor and Hannan had represented IBI since 1980. Of the two checks received by this firm, #13418 was given to O'Connor and Hannon for previously rendered legal services. The second check, #13419, was paid to O'Connor and Hannan as a retainer for legal services to be performed in connection with IBI's trading suspension. The O'Connor and Hannan checks were received at approximately 10:00 a.m. on July 10, 1984 and were cashed soon thereafter. These checks were taken to the bank immediately because O'Connor and Hannan had

previously received an insufficient funds check from IBI.

I will address the following issues in the order presented.

(1) Whether bankruptcy judges were constitutionally appointed?

(2) Whether bankruptcy courts have jurisdiction over SIPA liquidations?

(3) Whether the payment of $25,659.80 to O'Connor and Hannan, check #13418, fell within the voidable preference exception in 11 U.S.C. § 547(c)(2) as it existed before the Bankruptcy Amendments and Federal Judgeship Act of 1984?

(4) Whether the payment of $11,858.00 to Davis, Gillenwater & Lynch, check #13417, constituted a voidable preference under 11 U.S.C. § 547(b)?

Under Rule 8013, Rules of Bankruptcy Procedure[1], the district court may

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[1] Bankruptcy Rule 8013 provides in pertinent part:

> "On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgement, order or decree or remand with (continued...)

affirm, modify, reverse or remand a bankruptcy court judgement. *In re Brown*, 68 B.R. 670 (D. Colo. 1986). This procedural authority was stated by the *Brown* court as follows:

> "[The District] Court is bound to accept the Bankruptcy Judge's findings of fact unless they are clearly erroneous. Similarly, due regard in this context must be given to the lower court's opportunity to hear firsthand the testimony of the witnesses. However, this same presumption does not apply to conclusions of law, and this Court may make an independent

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[1](...continued)
instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."

This rule accords to the findings of a bankruptcy judge the same weight given the findings of a district judge under Rule 52, Fed. R.Civ.P. 9 *Collier on Bankruptcy* par 8013.01, at pp. 8013-1 (15th ed. 1988).

> examination and determination of the ultimate legal conclusions to follow from the facts. . .
>
> The 'clearly erroneous' standard was explained by the Supreme Court in *Comm. v. Duberstein*, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960), wherein the Court stated: 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . The rule itself applies also to factual inferences from undisputed basic facts. . .'" *id.* at 671 (citations omitted).

Thus, the bankruptcy court's factual findings are not to be disturbed on appeal unless they are clearly erroneous. However, the bankruptcy court's conclusions of law will be reviewed under a *de novo* standard. *In re Mullet*, 817 F.2d 677-79 (10th Cir. 1987).

The Constitutionality of the Bankruptcy Judges' Terms.

The Davis defendants first address the constitutionality of the bankruptcy judges' terms. (Davis brief, at 6.). These defendants assert that the bankruptcy court did not have jurisdiction to hear this matter because when BAFJA became law all bankruptcy judge positions were vacant. They contended that this occurred because the Bankruptcy Act of 1978 expired on June 27, 1984 but the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA")[2] was not signed into law until July 10, 1984. The Davis defendants further assert that BAFJA,

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[2] Pub.L. No. 98-353, 98 Stat. 333 (1984).

sections 121(e)[3] and 106(a),[4] is an attempt by Congress to retroactively reinstate bankruptcy judges whose terms had expired on June 27, 1984, thus violating the Appointments Clause of the United States Constitution.[5]

Numerous courts interpreting the of BAFJA provisions that extended the terms of bankruptcy judges, have held that they did not violate the appointments clause.

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[3] Section 121(e) of BAFJA provides: "The term of office of any Bankruptcy Judge who was serving on June 27, 1984, is extended to and shall expire at the end of the day of enactment of this Act."

[4] Section 106(a) of BAFJA provides: "The term of an office of a bankruptcy judge who is serving on the date of the enactment of this Act is extended to and expires four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

[5] U.S. Const. art. II, § 2, cl. 2.

See In re Sweetwater, 55 B.R. 724, 726-28 (D. Utah 1985). The *Sweetwater* court stated:

> This court agrees with Jude Schnacke's conclusion in that case [*In re Benny*, 44 Bankr. 581, 587-88 (N.D. Cal 1984)] that there was no 'gap' between June 27, 1984 and July 10, 1984, during which the bankruptcy courts ceased to exist. The hold-over provisions of the 1978 Act, sections 404(b) and (d) (as amended), authorized the bankruptcy judges to continue in office until June 27, 1984, or until their successors were appointed or took office. Because no bankruptcy judges were appointed or took office between June 27 and July 10, 1984, the bankruptcy judges serving on June 27, 1984, continued in office at least until July 10, 1984. Thus, the 1984 Act is not constitutionally infirm. It did not 'appoint' interim bankruptcy judges, in violation of the appointments clause, because there were no vacant offices to appoint them to. Neither was it an impermissible retroactive extension of the bankruptcy judges' offices, since their offices had not

expired at the time the act was passed." *Id.* at 727.

Accord: In re Production Steel, Inc., 48 Bankr. 841, 846-49 (M.D. Tenn. 1985); *In re Moody*, 46 Bankr. 231, 233 (M.D. N.C. 1985); *In re Tom Carter Enterprises, Inc.*, 44 Bankr. 605, 607-08 (C.D. Cal. 1984); *In re Western World Funding, Inc.*, 52 Bankr. 743, 762 (Bankr. D. Nev. 1985); *Matter of Baldwin-United Corp.* 48 Bankr. 49,53 (Bankr. S.D. Ohio 1985). The defendants have not cited any case holding that BAFJA is unconstitutional. Therefore, the defendants' position is untenable and I uphold the constitutionality of BAFJA.

Bankruptcy Court Jurisdiction Over SIPA Liquidations.

The bankruptcy court concluded that BAFJA deprived it of jurisdiction over SIPA liquidations. (Op. at 18, R. at

319)[6] The Davis defendants assert that the bankruptcy court erred in determining that it had jurisdiction to adjudicate preferential and fraudulent transfer actions brought by the trustee. (Davis brief, at 10-12). I need not reach this issue, however, if I conclude that the bankruptcy court erred by concluding that bankruptcy courts lack jurisdiction over SIPA liquidations. If bankruptcy courts have the authority to preside over SIPA liquidations, they must be able to apply

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[6] It must be noted that while the bankruptcy court held that it lacked jurisdiction over SIPA liquidations it still proceeded to rule on the remaining issues. The Court stated: "recognizing that legal analysis and authority has previously been strained and stretched to save the bankruptcy court system where Congress has failed to act, it is possible that, on appeal, analysis by an appellate court may create authority where I have found none to exist." (Op. at 18, R. at 319).

11 U.S.C. §§ 547 and 548 (sections of the Bankruptcy code allowing the trustee to set aside preferential and fraudulent transfers) made applicable in SIPA liquidations by 15 U.S.C. § 78fff(b), in order to effectively carry out the liquidation.

From the bankruptcy court's perspective, 28 U.S.C. § 157 repeals by implication 15 U.S.C. § 78eee(b)(4). Section 157 defines the jurisdiction of bankruptcy courts. It provides:

> "(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for this district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section,

> and may enter appropriate orders and judgements, subject to review under § 158 of this title."

Title 15 U.S.C. § 78eee(B)(4), on the other hand, is the section of SIPA that authorizes the removal of SIPA liquidations to bankruptcy court. It provides:

> "REMOVAL TO BANKRUPTCY COURT.
> Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application of the issuance of the protective decree was made."

The bankruptcy court reasoned that SIPA matters arise under title 15 and are not

"cases under title 11" nor proceedings "arising under" or "arising in or related to a case under title 11." (Op. at 14, R. at 315). The court engaged in an extremely literal interpretation of the two statutes; because BAFJA vests exclusive jurisdiction of title 11 cases in the district courts, a strict reading of section 78eee(b)(4) would require a district court to remove a SIPA liquidation to itself. The bankruptcy court concluded that this interpretation would result in absurdity. (Op. at 16, R. at 317).

Although literally, it appears that BAFJA renders 15 U.S.C. § 78eee(b)(4) meaningless, a court is required to avoid interpretations of statutes that result in "self-nullification" or an unreasonable result. In *Takao Ozawa v.*

United States, 260 U.S. 178, 43 S.Ct. 65, 67 L.Ed. 199 (1922), the United States Supreme Court stated:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving this words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." *Id.* at 194, 43 S.Ct. at 68.

Additional rules of statutory construction also mandate that this court not interpret BAFJA as repealing 15 U.S.C. § 78eee(b)(4). *See Watt v. Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). *Watt* stated:

> "Without depreciating this general rule, [that the more recent of two irreconcilably conflicting statutes governs] we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the legislative history is guided by another maxim: 'repeals by implication are not favored.' *Morton v. Mancari*, 417 U.S. [535], at 549 [94 S.Ct. 2474, at 2482, 41 L.Ed.2d 290] [(1974], quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 [56 S.Ct. 349, 352, 80 L.Ed. 351] (1936). 'The intention of the legislature to repeal must be clear and manifest . . . ' We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* 451 U.S. at 266-67, 101 S.Ct. at 1678 (citations omitted).

Because repeals by implication are not favored, absent a clear legislative intent to repeal, a repeal by implication may be found only if there is a "manifest inconsistency" or "positive repugnance" between two statutes. *Mercantile*

National Bank v. Langdeau, 371 U.S. 555, 565 (1963) (citing *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939). On the same subject, *Morton* stated:

> "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable . . . Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, at 550-51, 94 S.Ct. 2474, at 2482-83, 41 L.Ed.2d 290 (1974).

In the instant case, I find no evidence of any intention by Congress for BAFJA to repeal SIPA. Federal district courts have long engaged in the practice of referring SIPA liquidations to bankruptcy courts.

In *Exchange National Bank of Chicago v. Wyatt*, 517, F.2d 453 (2d Cir. 1975),

the Second Circuit concluded that the referral of SIPA proceedings to the Bankruptcy courts effectuated the purposes of SIPA. It is important to note that the court came to this conclusion while interpreting SIPA before it contained any of the direct removal provision that it now contains in 15 U.S.C. § 78eee(b)(4). The court emphasized that the power of the district court to refer SIPA proceedings to referees in bankruptcy was not only "consistent with the purposes of SIPA but essential." *Id.* at 457. The court went on to state:

> "The process for the determination of ["customer"] claims [in a SIPA proceeding] did not differ in any significant respect from what would have been required in a large stockbroker bankruptcy before enactment of SIPA; . . . This is the kind of business for which bankruptcy judges

> have developed special expertness and administrative skills and which Congress did not intend to dump on already overburdened district courts with needed clerical and other facilities." *Id.* at 457-58.

In a more recent decision, the Second Circuit affirmed its preference that SIPA liquidations be processed in bankruptcy court. *See S.E.C. v. American Board of Trade, Inc.* 830 F.2d 421, 436 (2d Cir. 1987).[7] The court emphasized that "[w]e are, however, disturbed by the subsequent use of the receivership to effect the liquidation of the ABT entities." *Id.* at 436. After reviewing three of its former decisions where the

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[7] For an excellent discussion of *S.E.C. v. American Board of Trade, Inc.* see Sabino, *The Role of Bankruptcy Courts in Stockbrokerage Liquidations,* 16 Sec.Reg.L.J. 227 (1988).

court had expressed similar reservations,[8], the court stated:

> "[T]he functions undertaken by the district court in this case demonstrate the wisdom of not using a receivership as a substitute for bankruptcy . . . . [T]he district court essentially transformed itself into a court of bankruptcy aided by a receiver performing the tasks of a bankruptcy trustee. For example, the court has taken upon itself the burden of processing proof-of-claim forms filed by thousands of noteholders and other creditors, of setting priorities among classes of creditors, and of administering sales of real property, all without the aid of either the experience of a bankruptcy judge or the guidance of the bankruptcy code . . . . We now state, however, that in actions of the present kind brought in the future by the SEC, we

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[8] The court reviewed and quoted its decisions in *Esbitt v. Dutch-American Mercantile Corp.*, 335 F.2d 141 (2d Cir. 1964); *S.E.C. v. S & P National Corp.*, 360 F.2d 741 (2d 741 (2d Cir. 1966); and *Lankenau v. Coggeshall & Hicks* 350 F.2d 61 (2d Cir. 1965).

> expect counsel for the agent, as an officer of the court and as part of his or her individual professional responsibility, to bring our views, as stated in this and other decisions, to the attention of the district court before the court embarks on a liquidation through an equity receivership." *Id.* at 437-48 (emphasis added).

Because I find no "manifest inconsistency" or "positive repugnancy" and do not find that BAFJA and SIPA are irreconcilable, I adopt the Second Circuit's reasoning set forth in the line of cases relied on and culminating in *S.E.C. v. American Board of Trade, Inc.*, to the effect that bankruptcy courts are the tribunals best equipped to preside over SIPA liquidations and are authorized to do so.

In enacting BAFJA, Congress did not expressly repeal 15 U.S.C. § 78eee or 78fff. I decline to hold that a repeal

by implication occurred in this instance. absent express language to the contrary I conclude that Congress intended these sections of SIPA to remain in force after BAFJA and that Congress intended that SIPA liquidations be conducted in bankruptcy courts. Furthermore, I conclude that, although a bankruptcy removal under 28 U.S.C. § 157 is discretionary with the district court, and a SIPA liquidation removal under 15 U.S.C. § 78eee(b)(4) appears mandatory by its language, the difference is insignificant. as a practical matter all bankruptcy cases can be removed even though they can be withdrawn pursuant to 28 U.S.C. § 157(d). By reconciling BAFJA and SIPA, removal of SIPA liquidations can be accomplished at the discretion of the district court and thereby fulfill

the intent of Congress in BAFJA to place supervision of bankruptcy courts in the district courts.

Payment of $25,659.80 to O'Connor & Hannan - Check #13418

The bankruptcy court concluded that check #13418, paid to O'Connor & Hannan, was not voidable as a preferential transfer because it fell within the exception of 11 U.S.C. § 547(c)(2). (Op. at 23, R. at 324). The Trustee presents a compelling argument that all the elements of a preferential transfer under 11 U.S.C. § 547(b) exist with regard to this payment. I need only reach this issue if all the elements of the exception found in 11 U.S.C. § 547(c)(2) are not present.

In order for the exception set out in 11 U.S.C. § 547(c)(2) to apply, the following elements must exist with regard to the transfer:

> (1) The transfer must be made in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
> (2) The transfer must be made not later than 45 days after such debt was incurred;
> (3) The transfer must be made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (4) The transfer must be made according to ordinary business terms.

It is important to note that BAFJA deleted the forty-five day requirement of 11 U.S.C. § 547(c)(2). However, this case the forty-five day limit applies because the case was filed on July 10, 1981. BAFJA explicitly states that it will only apply to cases filed within 90 days after July 10, 1984. BAFJA, Pub.L.

98-353, § 553(a), 98 Stat. 392 (1984). 1984 U.S. Code Cong. and Admin. News, p. 576.

The bankruptcy court found that: "[t]he services rendered which are represented by Check No. 13418 were for legal services rendered prior to an not in contemplation of or in connection with the SIPA action." (Op. at 22, R. 323). The court also found that O'Connor and Hannan had represented IBI since 1980. (Op. at 9, R. at 310). Therefore, I hold that these debts were incurred in the ordinary course of business. I will next consider the third and fourth elements and later return to the second.

The bankruptcy court concludes that the payment was made in the ordinary course of business and according to ordinary business terms. (Op. at 23, R.

at 324). The Trustee, however, argues that:

> This finding is clearly erroneous in light of the fact that trading in IBI's principal securities produce - Chipola Stock - had been suspended by the SEC; IBI had ceased doing any securities business whatsoever because it was in violation of the Commission's net capital rule; there were rumors on the street that the SEC was going to close down IBI; both the NASD and the SEC were in IBI's offices investigating its books and records, taking depositions and interviewing IBI's principals; and SIPC liquidation had been discussed by the layer-defendants and the lawyer-defendants were demanding immediate payments which they instantly exchanged for cashier's checks. IBI didn't indeed, it could not, do anything in the ordinary course of business after July 2, 1981. (Trustee's brief, at 8).

July 2, 1981 is the date when, the Trustee alleges, Greg Kearns, one of O'Connor & Hannan's attorneys, "became aware of the suspension of Chipola, which

he knew was the major asset of IBI; and he was aware in response thereto, IBI had ceased operations in the securities business." (Trustee's brief, at 5).

O'Connor & Hannan assert, in response, that IBI was unable to meet net capital requirements because of the stop-trade order issued by the SEC on July 2, 1981.[9] Only one summary stop-trade

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[9] The bankruptcy court acknowledged the method employed by the SEC to declare that a company is in violation of the net capital requirement. The bankruptcy Court stated:

> It is interesting to observe that all of these figures and requirements [associated with the valuation of the debtor's net capital] are predicated upon a system whereby the SEC can suspend trading for the investigation of a violation of the new capital rule, thus creating a situation where there is no ready market. Since there is no ready market, paragraph 15-c3-1 of the net capital rule [17 CFR 240.15c3-1] requires that the stock be

(continued...)

order could be issued by the SEC without notice and a hearing. *Sloan v. S.E.C.* 547 F.2d 152, 156-57 (2d Cir. 1976). O'Connor & Hannan properly point out that at the time check #13418 was received, the stop-trade order was about to expire and thereafter IBI would be able to meet its net capital requirement and resume trading securities. Further, the

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[9](...continued)
valued at zero. This, then, is of great aid to the SEC in supporting it [sic] contention that the organization under investigation is in violation of the net capital rule. On this basis, the SEC then continued the suspension in trading until any net capital deficiencies it has declared to exist by virtue of its own creation of 'no ready market' is [sic] replenished from other sources. This manipulative practice has apparently received the sanction of the courts and the Congress over the years." (Op. at 6, R. at 307).

bankruptcy court's findings of fact show that IBI had sent funds payable toward past-due accounts in March and May, 1981. (Op. at 9, R. at 310). Therefore, I hold that the transfer of $25,569.80, made July 10, 1981, was in the ordinary course of business and according to ordinary business terms.

The remaining element of 11 U.S.C. § 547(c)(2) is the requirement that the debt must have been incurred within 45 days of the payments. Although the bankruptcy court made detailed findings as to the time most of the debt represented by the $25,569 payments was incurred, the court failed to mention that it was applying the 45 day limit. This 45 day time limit applies because the pre-BAFJA version of 11 U.S.C. § 547(c)(2) was in effect when the transfer

at issue occurred. Therefore, the only remaining issue with regard to the $25,659.80 payments is when the 45 day period began.

O'Connor & Hannan assert that the entire amount of this payment falls within the 45 day time limit. They argue that although payment was received more than 45 days after some of the services were rendered, they received payment within 45 days after sending a statement to IBI. (O'Connor brief, at 17-18). This position, however, indicates a fundamental misunderstanding of the 45 day requirement and of the purpose behind 11 U.S.C. § 547(c)(2).

The purpose of 11 U.S.C. § 547(c)(2) is to leave normal financial transactions undisturbed. House Report No. 95-595, 95th Congress, 1st Sess. 373-374 (1977),

U.S. Code Cong. & Admin.News 1978, pp. 5787, 6329, 6330. With this purpose in mind, courts interpreting § 547(c)(2) hold that "a debt is incurred on the date upon which the debtor first becomes legally bound to pay." *In re Balducci Oil Co., Ltd.* 33 B.R. 843, 846 (Bankr. D.Colo. 1983) (citing *In re Iowa Premium Service Co., Inc.* 695 F.2d 1109, 1111 (8th Cir. 1982); *Barash v. Public Finance Corp.*, 658 F.2d 504, 512 (7th Cir. 1981); and *In re Brown*, 20 B.R. 554 (Bankr. N.Y. 1982).

In this situation, IBI became legally bound to pay when the services were performed and not when IBI received a statement. *In re Mindy's, Inc.*, 17 B.R. 177 (Bankr. S.D. Ohio 1982) does nothing to support the position taken by O'Connor & Hannan and IBI did not incur

the debt for the purposes of § 547(c)(2) until they sent a statement. Any interpretation and application of *Mindy's*, must be confined to is particular facts. In *Mindy's*, the debtor agreed to pay rent on commercial property assessed as a percentage of the profit earned by the debtor in the operation of a business son the leased premises. The runt became due 10 days into the month following the month for which the rent was payable. *Id.* at 179. The court held that the debtor did not incur the debt for the purposes of § 547(c)(2) until "the actual rental obligation for the prior month could be calculated and thus due under the terms of various leases." *Id.* at 180.

In this situation, I decline to apply the *Mindy's* reasoning because the

amount owed for legal services was not indeterminate until IBI received a statement from O'Connor & Hannan. Although the exact amount of the fees owed by IBI may not have been calculated immediately after O'Connor & Hannan provided the legal services, these fees were clearly calculable as they were incurred. For this reason, I hold that only the debts incurred 45 days before July 10, 1981, fall within the exception in 11 U.S.C. § 547(c)(2). Thus I conclude that the bankruptcy court erred as a matter of law when it ruled that O'Connor & Hannan were entitled to retain the entire $25,659.80.

O'Connor & Hannan received check #13418 on July 10, 1981, and therefore the 45 day period began May 26, 1981. In the bankruptcy court's findings, "the sum

of $8,146.25 was attributable to legal services rendered in June of 1981, together with costs incurred in the amount of $71.30." (Op. at 9, R. at 310.) Therefore, O'Connor & Hannan are entitled to retain $8,217.55 plus whatever fees can be attributed to services rendered May 26 through May 31, 1981.

Defendant's exhibit N, introduced in the bankruptcy court, adversary proceeding, consists of daily time sheets of O'Connor & Hannan, including entries for the last six days of May 1981. These time sheets show that a total of 20.5 hours were billed to IBI for the period May 26, to May 31, 1981. Further, the defendant's exhibit O is a hand-written billing analysis that sets out the hours billed by various individuals, the

different hourly rates charged by each individual and the total amount of fees attributable to each individual. this analysis provides that a total of $1,675 in fees was incurred by IBI from May 26, to May 31, 1981.

Defendant's Exhibit H is a statement for all legal services rendered by O'Connor & Hannan to IBI in May 1981. It indicates that IBI incurred $1,879.65 in costs for various disbursements during that month. While the statement does not delineate the amount of costs incurred on a weekly or daily basis in the same manner that exhibits N and O delineate how legal fees were incurred, a figure for the period May 26 through May 31 can be estimated. Dividing the total of $1,879.65 by twenty-one, the number of workdays in May, 1981, and then

multiplying by four, the number of days IBI incurred legal fees from May 26 to May 31, 1981, equals $358.03. Adding this to the $1,675 in fees gives $2,033.03 as the total amount incurred by IBI from May 26 to May 31, 1981.

Adding this figure to the $8,217.55 in fees and costs incurred by IBI in June 1981 equals $10,250.58 as the total amount of check #13418 that O'Connor & Hannan are entitled to retain. Because only $10,250.58 falls within the 45 day period, and therefore, within the exception of § 547(c)(2), I must determine if the rest of this payment, $15,409.22, constitutes an avoidable preference under 11 U.S.C. § 547(c)(2), I must determine if the rest of this payments, $15,409.22, constitutes an avoidable preference under 11 U.S.C. §

547(b).[10] Section 547(b) is "intended

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[10] O'Connor & Hannan argue that the issue of whether check #13418 is a voidable preference under § 547(b) is not properly before this court because the Trustee did not specifically refer to subsection (b) of § 547 but only to § 547(c) when he designated issues on appeal. I hold that the Trustee fulfilled his obligation to designate the record by requesting the entire transcript. Bankr. Rule 8003 is modeled after Rule 10, Fed.R.App.P. In the context of Rule 10 it has been stated:

> "[i]f the entire transcript is on file, or if the appellant orders the whole of its, he has no further responsibility under Rule 10(b). He need not file a designation upon the appellee and he need not serve a statement of the issues which he intends to present on the appeal." *9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice* par. 210.05 (2d ed. 1985).

Furthermore, courts dealing with situations where the appellant has failed to properly designate issues on appeal have held that dismissal of the appeal is not warranted. *See Island Creek Coal Co. v. Local Union No. 1827,* 568 F.2d 7, 8 (6th Cir. 1977)(holding that designating only a partial transcript for appeal did

(continued...)

to discourage creditors 'from racing to the courthouse to dismember the debtor during his slide into bankruptcy' and to facilitate equality of distribution." *In re Balducci Oil Co., Inc.* 33 B.R. 843,

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[10](...continued)
not warrant dismissal where appellees were neither misled nor prejudiced by appellant's failure to serve a statement of issues, appellees could have sought supplement to record, and there was no evidence that appellant's omission was made in bad faith); *See also In re Bienert,* 48 B.R. 326, 326-28 (N.D. Iowa 1985) (holding that an untimely designation of issues by the debtor did not warrant dismissal).

Because the Trustee designated the entire record in this matter and he raised issues concerning § 547(c), I hold that he fulfilled his duty under Bankruptcy Rule 8003. I also hold that O'Connor & Hannan will not be prejudiced by my addressing issues dealing with § 547(b). If a transfer does not fall within an exception under § 547(c) then the next logical point of inquiry is whether it is avoidable under § 547(b). Even though O'Connor & Hannan failed to brief the issue of whether check #13418 is voidable as a preferential transfer, I hold that further briefing would not materially assist my decision.

845 (Bankr. D. Colo 1983) (quoting HR Rep. No. 95-595, 95th Congress, 1st session at 177-178 (1977), U.S.Code Cong. & Admin. News 1978, pp. 5787, 6138; citing *In re Martella*, 22 B.R. 649 (Bankr. D.Colo. 1982). To establish a voidable preference the Trustee must prove all five elements of § 547(b). They are:

> "any transfer of property of the debtor --
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made --
> (A) on or within 90 days before the date of the filing of the petition; or
>
> * * * * * *
>
> (5) that enables such creditor to receive more than such creditors would receive if --
> (A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and
(C) such creditor received payments of such debt to the extent provided by the provisions of this title."

In this situation, check #13418 clearly benefitted O'Connor & Hannon on account of an antecedent debt, 90 days before the filing of the SIPA liquidation. Mr. Kearnes indicated that IBI had a continuous past due balance with O'Connor & Hannan throughout 1981. (Bankr. Trans. vol V, at 412-18). Therefore, the only disputed elements are §§ 547(b)(3) and 547(b)(5).

Based on findings of fact derived from the testimony of expert accountant witnesses (Op. at 4-8, R. at 305-09), the bankruptcy court concluded that IBI was insolvent. (Op. at 21, R. at 322). The bankruptcy court valued Chipola Stock at $.19, a price it determined to be the

true value of the stock when trading was suspended. The court made this finding of fact by determining that Jackson Arthur Woodruff, Jr., a NASD examiner, was the most credible of the expert witnesses who testified as to the stock's value (Op. at 8, R. at 309). There is nothing to indicates that this is clearly erroneous.

It is clear that O'Connor & Hannan received more than it would have under Chapter 7 because IBI's insolvent financial condition indicates that is unsecured creditors would receive a small percentage, if any, of the amounts owed them.

The bankruptcy court also erred as a matter of law when it concluded that O'Connor & Hannan had a valid attorney's lien, as provided in Colo. Rev. Stat. §

12-5-119 (1973), on check #13418. This statute allows an attorney a lien on the property, including money of a client, that comes into the attorney's possession, in order to secure payment of funds owed to the attorney. *See In re Ranes,* 31 B.R. 70, 72 (Bankr. D.Colo. 1983) ("[t]he statute grants attorneys two types of liens: (1) a possessory lien on all the papers of his client in his possession; and (2) a 'charging lien' on any judgement he may have obtained:); *In re Storage Tech. Corp.*, 45 B.R. 363, 364 (D. Colo. 1985) (Quoting *Ranes.* at 72); *Donaldson, Hoffman & Goldstein v. Gaudio,* 260 F.2d 333, 335 (10th Cir. 1958) (interpreting the statuary predecessor to Colo. Rev. Stat. §§ 12-5-119 & 12-5-120).

In the instant case, the money came directly from the client IBI to pay a debt. It did not come from a third source, such as the proceeds of a settlement, as contemplated by the statute. To adopt the bankruptcy court's logic would require me to hold that O'Connor & Hannan had an attorney's lien **before** they actually had possession of the check. This is clearly not the type of lien intended by Col.Rev. Stat. § 12-5-119 (1973). *cf. In re Oiltech, Inc.* 38 B.R. 484, 487 (Bankr.D.Nev. 1984)(holding that a law firm, possession $7,000.00 owed to its client when compensable work had been completed, was entitled to a retaining or possessory lien). Other courts have not hesitated to set aside transfers as avoidable preferences where a debtor has transferred funds to an

attorney on the eve of bankruptcy. *See In the matter of Darke*, 18 B.R. 510, 513-14 (Bankr. E.D. Mich. 1982). Therefore, $15,409.22 of check #13418 falls within the trustee's avoidance power as a preferential transfer.

Payment of $11,858 to Gilbert K. Davis - Check #13417.

With regard to the payment of $11,858 to Gilbert K. Davis, the bankruptcy court stated:

> "[t]he evidence convinces me that all of the services rendered by Davis and by Davis, Gillenwater & Lynch were in contemplation of or in connection with the SIPA case and its anticipated filing. Accordingly, [11 U.S.C.] § 329 of the Code is applicable, and Davis has filed to establish compliance with that section. This destroys any possible exception to avoidance under § 547(c)(2). Further, most, if not all, of the representation provided by Davis and Davis,

Gillenwater & Lynch was for individuals and not for IBI."

The court therefore concluded that this payment was an avoidable preference under 11 U.S.C. § 547(b). Because I do not find the bankruptcy court's findings to be clearly erroneous, I confirm that court's legal conclusion that failure to comply with 11 U.S.C. § 329 destroyed any exception to avoidance under § 547(c)(2).

Further, I hold that the bankruptcy court's conclusion that the payment reflected in check #13417 did not constitute a contemporaneous exchange of value is valid. A stated earlier, a client becomes legally obligated to pay as soon as services are rendered; if payment is received after the debt is incurred, this is payment of an antecedent debt. *See In re Balducci, supra*, at 845-46. Here, payment was of

an antecedent debt because representation by the Davis defendants commenced before they received check #13417.

The $11,858 payment can also be avoided because the Davis defendants were retained to resist the liquidation of IBI. *See SEC v. Alan F. Hughes, Inc.*, 481 F.2d 401, 102-03 (2d Cir. 1973) (court voided transfer of fees to attorneys hired to resist appointment of trustee to commence liquidation of broker-dealer). *Accord SEC v. Capital Counsellors, Inc.*, 378 F.Supp. 224, 226 (S.D. N.Y. 1974) (legal fees paid counsel to oppose application for liquidation held not payable from assets of receivership estate). In summary, check #13417 was neither a contemporaneous exchange of value under § 547(c)(1) nor properly payable from the estates of a

securities trader undergoing liquidation. Therefore, this payment constitutes an avoidable preference under § 547(b).

Payment of $25,000 to the Davis Defendants - Check #13432

The Davis defendants also challenge the bankruptcy court's conclusion that the payment of $25,000 reflected in check #13432 was voidable as a fraudulent transfer under 11 U.S.C. § 548(a)(2). (Op. at 27, R. at 328). In order for § 548(a)(2) to apply, the trustee must be establish that:

> (1) A Transfer of an interest of the debtor in property occurred;
>
> (2) The transfer occurred within one year of the bankruptcy filing;
>
> (3) The debtor received less than a reasonably equivalent value in exchange for the transfer; and
>
> (4) The debtor was insolvent on the date of the transfer.

See In re Ears, Nose & Throat Surgeons of Worcester, Inc., 49 Bankr. 316, 319 (Bankr. Mass 1985).

Here, a transfer clearly occurred within one year of the liquidation petition. I confirm the bankruptcy court's conclusion that IBI was insolvent at the time this transfer occurred. Therefore, the only remaining element is whether IBI received less than a reasonably equivalent value in exchange.

The bankruptcy court concluded that an equivalent exchange did not occur. (Op. at 25-26, R. at 326-27). This conclusion was warranted for several reasons. First, the Davis defendants failed to allow the court to pass upon the reasonableness of the attorney's fees, as intended by 11 U.S.C. § 329. Second, they failed to allow the court to

approve all legal representation, as intended by 11 U.S.C. § 327. Third, as previously stated, representation by the Davis defendants was at least in part for the benefit of individual directors of IBI, rather than IBI. Fourth, legal fees may not properly be paid from the estate to resist a liquidation petition. For these reasons, I uphold the bankruptcy court's conclusion that IBI received less than equivalent value for the $25,000 payment, and therefore conclude that check #13432 was voidable as a fraudulent transfer.

Accordingly, IT IS ORDERED that:

(1) The bankruptcy court's decision of December 10, 1985 is affirmed in part and reversed in part;

(2) The portion of the bankruptcy court's decision holding that BAFJA repeals the removal section of SIPA, 15 U.S.C. § 78eee(b)(4) is reversed;

(3) The bankruptcy court's ruling that the entire payment of $25,659.80 in check #13418 to O'Connor & Hannan fell with the exception to the trustee's avoidance power in 11 U.S.C. § 547(c)(2) is reversed;

(4) O'Connor & Hannan are entitled to retain $10,250.58 of check #13418 because this portion falls within the exception in 11 U.S.C. § 547(c)(2);

(5) O'Connor & Hannan must relinquish the remaining portion of check #13418, $15,409.22 because is constitutes a voidable preference under 11 U.S.C. § 547(b);

(6) The bankruptcy court's ruling that the payment of $11,858 to the Davis defendants in check #13417 constituted a preferential transfer under 11 U.S.C. § 547(b() is affirmed; and

(7) The bankruptcy court's ruling that the payment of $25,000.00 to the Davis defendants in check #13432 constituted a fraudulent transfer under 11 U.S.C. § 548(a)(2) is affirmed.

Each party shall bear his or its own costs.

ON MOTION TO AMEND

AND SUPPLEMENT

On October 5, 1989, this court entered an Order and Judgement ruling: (1) that the bankruptcy court has jurisdiction over the above-captioned proceeding; (2) that $15,409.22 of check #13418 paid to O'Connor and Hannan constituted a voidable preferential transfer; and (3) that the entire amount of check #13417 paid to the Davis defendants constituted a voidable preferential transfer; and (4) that the entire amount of Check #13432 paid to the Davis defendants constituted a voidable fraudulent transfer. Presently pending is the trustee's, James H. Turner ("Trustee"), motion to amend and

supplement the order and judgment pursuant to Rule 59(e), Fed.R.Civ.P.[1] O'Connor & Hannan have responded by opposing the motion.

In his motion to amend, the Trustee seeks prejudgment interest on the amounts set aside by this court pursuant to 11 U.S.C. § 547(b) and § 548(a)(2) as preferential and fraudulent transfers. The Trustee asserts that when a transfer is set aside, "the trustee is entitled to pre-judgement interest thereon from the earlier of the date on which demand is made for the return of the preference or the commencement of the adversary

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[1] Rule 59(e) provides: "[a] motion to alter or amend the judgement shall be served not later than 10 days after entry of a judgment." The Trustee complied with Rule 59(e) by filing his motion to alter or amend the judgement on Monday, October 16, 1989.

proceeding." (Trustee's motion to amend, at 2 citing *In re Baker & Getty Financial Services, Inc.*, 88 B.R. 792, 800 (Bankr. N.D. Ohio 1988); *In re Independent Clearing House Co.*, 41 B.R. 985, 1015 (Bankr. D.Utah 1984) *rev'd on other grounds*, 60 B.R. 985 (D. Utah 1986).

In opposition, O'Connor & Hannan assert that the Trustee is not "entitled" to pre-judgement interest; rather, it is allowed only within the discretion of the trial court. (O'Connor & Hannan's response, at 3 citing *In re Frigitemp Corp.*, 781 F.2d 324, 325 (2d Cir. 1986); *In re Art Shirt Ltd., Inc.*, 93 B.R. 333 (E.D. Pa. 1988); *In re Four Seasons Sporting Goods, Inc.*, 46 B.R. 528 (Bankr. N.D. Cal. 1985); *In re Roco Corp.*, 37 B.R. 770, 774 (Bankr. D.R.I. 1984). Because the bankruptcy court and this

court remained silent on the issue of prejudgment interest, O'Connor & Hannan conclude that neither court intended to award such interest. Therefore, O'Connor & Hannan seek an order denying the motion to amend and supplement the order and judgment.

In re Independent Clearing House Co, 41 B.R. 985, 1015 (Bankr. D. Utah 1984) *rev'd on other grounds*, 60 B.R. 985 (D. Utah 1986) addressed the subject of prejudgment interest. The Court there stated:

> "[t]he Bankruptcy Code itself is silent on the subject [of the availability of prejudgment interest in actions to recover preferenail and fraudulent conveyances]. However, Collier suggests that, as under prior law, the bankruptcy court should exercise its equitable powers to award the trustee interest and costs. 4 *Colliers on Bankruptcy* par. 550.02, at 550-56 (15th ed. 1984).

> Ordinarily, the allowance of prejudgment interest and the fixing of the time from which interest shall accrue are discretionary with the court.
>
> An award of prejudgment interest is not punitive but compensatory, and is allowed where necessary to make such prevailing party whole . . . .
>
> It is well settlement that in an action to set aside a preference the trustee is entitled to prejudgment interest from the date of the demand for its return, or, in the absence of a prior demand, from the date of commencement of the adversary proceeding. . . .
>
> The allowance of interest from the date demand is made or a proceeding instituted, rather than the date of the transfer, is based on the idea that until such time the preferred creditors cannot be said to hold the property wrongfully." *Id.* at 1015 (citations omitted).

In support of his contention that a trustee is entitled to prejudgment interest, the trustee cites *In re Baker &*

Getty Financial Services, Inc. 88 B.R. 792, 800 (Bankr. N.D. Ohio 1988) and *In re Independent Clearing House Co, supra* As the above quoted language reveals, these cases hold that a trustee is "entitled to prejudgment interest from the date of demand for its return, or, in the absence of a prior demand, from the date of commencement of adversary proceeding." As a threshold matter, however, the overall authority to allow such recovery is within the discretion of the trial court.

In the instant action, the bankruptcy court ruled that the transactions at issue were preferential and fraudulent only after determining that it did not have jurisdiction to decide the entire dispute. (Maj. op at 1018). That court did not address

whether the Trustee was entitled to prejudgment interest, apparently because of its determination that it lacked subject matter jurisdiction over the entire liquidation.

The cases cited by the Trustee reveal a clear trend to award prejudgment interest to a trustee who successfully overturns preferential and fraudulent transactions. This trend leads me to conclude that the bankruptcy court abused its discretion by remaining completely silent on this issue. Because the trustee was entitled to set aside the preferential and fraudulent conveyances, specified in the October 5, 1989 order, the bankruptcy court should have decided the prejudgment interest issue. I remand the case to the bankruptcy court for that decision.

Payment of $25,000 to O'Connor & Hannan - Check #13419

The Trustee also seeks an amendment to the October 5, 1989 order upholding the bankruptcy court's determination that the $25,000 payment to O'Connor & Hannan, reflected in check #13419, constituted a voidable fraudulent transfer. Because my October 5, 1989 order specifically mentioned those portions of the bankruptcy court's order that were modified, portions not mentioned were by implication upheld. Nonetheless, in the interests of clarity, I affirm the bankruptcy court's conclusion to set aside the transfer of check #13419 as a fraudulent conveyance under 11 U.S.C. § 548(a)(2).

For the reasons set forth above, the issue of whether the Trustee is entitled

to prejudgment interest on check #13419 is also remanded to the bankruptcy court.

Accordingly IT IS ORDERED that:

(1) the bankruptcy court's opinion setting aside the payment of $25,000 to O'Connor & Hannan, reflected in check #13419, as a fraudulent conveyance, is affirmed;
(2) the issue of the Trustee's entitlement to prejudgment interest on all amounts set aside is remanded to the bankruptcy court;
(3) the bankruptcy court is ordered to make specific findings as to whether the Trustee is entitled to prejudgment interest on the amounts set aside and to conduct a hearing on that issue if deemed necessary; and
(4) the bankruptcy court is also ordered to make specific findings as to whether the Trustee is entitled to costs and attorneys' fees.

Each party shall bear his or its own costs.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF COLORADO

IN BANKRUPTCY

In re	)	
	)	
THE INVESTMENT BANKERS, INC.	)	
	)	
	)	Adversary No.
	)	82 M 87
Debtor.	)	
	)	
JAMES H. TURNER, SIPC, TRUSTEE	)	
	)	
vs.	)	
	)	
DAVIS, GILLENWATER & LYNCH and GILBERT K. DAVIS, individually and as partner of DAVIS, GILLENWATER & LYNCH, and O'CONNOR & HANNAN, a partnership	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the court as a result of a complaint filed by the trustee for the debtor, Investment Bankers, Inc. ("IBI"), a securities

broker dealer. The complaint seeks to avoid certain payments made by IBI to Davis, Gillenwater and Lynch ("Davis, Gillenwater), to Gilbert K. Davis ("Davis") and to O'Connor and Hannan. The basis upon which the avoidance action is sought is 11 U.S.C. §§547 and 548. It is also alleged that certain payments which were made to the defendants were for services which were not approved, as required by §327, and that the requirements of §329 were not followed by the defendants. Thus, the trustee alleges all payments to defendants are subject to avoidance. Jurisdiction, as alleged in the complaint which was filed on January 19, 1982, was predicated upon 28 U.S.C. §1471 and 15 U.S.C. §78fff(b). Under §78eee(b)(4) of the Securities Investor Protection Act (SIPA), the entire liquidation proceeding was removed to this court after the trustee was appointed by the United States District Court, pursuant to an application submitted to that court under the SIPA.

Trial of this matter was commenced on August 7, 1984 and continued for a period of three days but was not completed. Thus, it was resumed in July, 1985 and was completed on July 19, 1985. I have considered the testimony presented in the trial, as well as deposition evidence and exhibits which have been submitted. The trustee interposed certain objections to deposition evidence, which objections are overruled. Thus, the designation of depositions submitted by the trustee has likewise been considered. I have also read the various briefs filed by the parties, both during and following trial, with the last such brief having been filed on August 16, 1985.

BACKGROUND

IBI, a Colorado corporation, acted as a securities broker dealer since October 23, 1980. A liquidation proceeding was commenced against the debtor (IBI) by the Securities Investor Protection Corporation (SIPC), pursuant

to authority granted to SIPC in the Securities Investor Protection Act, 15 U.S.C. §78aaa, et seq. (SIPA). The proceeding seeking liquidation of IBI was commenced on or about July 10, 1981. On July 15, 1981 the SIPA application for a liquidation order was confessed in the United States District Court for the District of Colorado, and the court appointed James H. Turner as trustee for liquidation of IBI.

On July 10, 1981, in addition to the application of SIPC for the appointment of a temporary receiver and permanent trustee to liquidate IBI, the Securities and Exchange Commission (SEC) filed a manipulation case in the United States District Court, seeking a preliminary and permanent injunction against the Company and two of its principals, Richard A. Belknap and William Gene Chandler. Belknap was the president and a director of IBI. Chandler was the office manager and a director of IBI. The injunction sought to prevent the defendants from effecting transactions or inducing the

purchase or sale of securities while IBI was in violation of "net capital" requirements provided for in the Securities Exchange Act of 1934 and Rule 17 CFR 240.15C3-1. The application for appointment of a receiver and trustee for the purpose of liquidating IBI was based upon the SIPC's determination that IBI had failed to meet its obligations to customers imposed by the SIPA and that grounds existed, specifically noncompliance with the net capital rule, for the court to issue orders for the protection of customers of IBI.

In the order of July 15, 1981 appointing Turner as trustee, the liquidation proceeding was removed to the United States Bankruptcy Court for the District of Colorado, pursuant to §5(b)(4) of SIPA, 15 U.S.C. §78eee(b)(4) (Supp. 1979). IBI consented to the order of July 15, 1981 with O'Connor and and Hannan executing the consent order as counsel for defendant IBI.

Subsequently, on July 20, 1981, the matter of the SEC's application for preliminary injunction, application for permanent injunction, and complaint on manipulation of the market came on for hearing, at which time the SEC withdrew its claim for injunctive relief against IBI in light of the appointment of a SIPC trustee and the pending liquidation of IBI. The other two defendants, Belknap and Chandler, stipulated to a court order restricting them from violating of the securities laws and from engaging in the securities business. That stipulated order was approved as to form by Gregory A. Kearns, of O'Connor and Hannan and by Gilbert K. of Davis, Davis, Gillenwater & Lynch, both of which attorneys were representing the defendants Belknap and Chandler.

After removal of the proceeding to the bankruptcy court, Turner filed a complaint seeking to avoid the transfer of four checks totaling $87,517.80 which had been executed and transferred to the defendants in this adversary proceeding

on July 10, 1981. Those four separate checks are as follows:

(a) Check #13417, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, in the amount of $11,858.00;

(b) Check #13418, dated July 10, 1981, payable to O'Connor & Hannan, in the amount of $25,659.80;

(c) Check #13419, dated July 10, 1981, payable to O'Connor & Hannan Trust Account in the amount of $25,000.00;

(d) Check #13432, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, of Davis, Gillenwater & Lynch, in the amount of $25,000.

FINDINGS OF FACT

The facts relevant to a resolution of the issues in this adversary proceeding are as follows:

On May 8, 1981, IBI became the principal underwriter of twenty million shares of Chipola Oil Corporation (Chipola), common stock. The stock opened on the market at ten cents per share. From that time forward, the price

rose slightly until, by about June 19, 1981, the price had been at a level of nineteen cents per share for approximately five weeks.

On June 19, 1981, the price began to rise dramatically, hitting fifty cents on June 26, 1981, sixty-five cents on June 30, 1981 and a dollar on July 1, 1981. During this period of time, there were approximately nineteen other market makers of Chipola stock. The rise in price was the result "up-ticking" by IBI and other market makers. However, the evidence is clear that IBI was the primary underwriter responsible for up-ticking.[2]

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[2]"Upticking is a process of buying stock from other broker dealers under circumstances resulting in a price escalation. Thus, as additional shares are acquired, the market in the stock is "upticked". The purpose of such a practice is to force short sellers (i.e. those who sell more stock than they have available for sale) to pay a higher price for stock necessary to cover the sales they have made. The term "cover their shorts" means to cover short sales,

(continued...)

This dramatic price escalation caused the SEC to investigate the possibility that the market was being manipulated, with the result that on July 2, 1981 the SEC delivered a letter to IBI advising that the SEC suspended trading in Chipola for a period of ten days, as of 7:45 a.m. on that date. This resulted in no further market being available for the sale of Chipola stock, with the result that its value was deemed to be zero at that point. Following the SEC investigation, IBI was admonished of the necessity to comply with the Commission's net capital rule and to notify the SEC by telegram if IBI was not in compliance. Later that same morning, IBI sent a telegram advising the SEC that IBI would cease operations until its net capital complied with Rule 13-C31 of the SEC.

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[2](...continued)
while the term "squeeze their shorts" is used to describe the process of forcing a short seller to cover.

The SEC and the NASD immediately dispatched investigators to the office of IBI to examine the books and records of the company in an effort to ascertain its true financial status. Most of this was in the presence of Gregory A. Kearns, a partner in O'Connor & Hannan, who had represented IBI since 1980.

The investigation was primarily conducted by Jackson Arthur Woodruff, Jr., an NASD examiner. His efforts revealed that, as of July 10, 1981, IBI had a negative net worth of $7,084,417.31, with total liabilities of $9,184,237.52. Thus, total assets were valued at $2,099,820.21. However, this computation was based upon valuing Chipola stock at zero.

Chipola was set at zero because trading had been suspended by the SEC on July 2, 1981, which left no ready market for the stock. According to the net capital rule, if there is no ready market for a stock, it must be valued at zero in determining compliance with the net

capital rule. Of the twenty million shares brought public, IBI had 14,663,157 shares in its inventory on July 10, 1981. On June 30, 1981, approximately nine to ten million shares were in inventory.

Valuing Chipola at zero, IBI was required to have $758,611.35 net capital on July 10, 1981. The net capital deficiency was $8,103,210.61. On this basis, it was determined that IBI would be required to place $4,423,002.44 into a special reserve account for the protection of its customers.

It is interesting to observe that all of these figures and requirements are predicated upon a system whereby the SEC can suspend trading for the investigation of a violation of the net capital rule, thus creating a situation where there is no ready market. Since there is no ready market, paragraph 15-c3-1 of the net capital rule requires that the stock be valued at zero. This, then, is of great aid to the SEC in supporting it

contention that the organization under investigation is in violation of the net capital rule. On this basis, the SEC then continues the suspension in trading until any net capital deficiencies it has declared to exist by virtue of its own creation of "no ready market" is replenished from other sources. This manipulative practice has apparently received the sanction of the courts and the Congress over the years. Aside from investigations of net capital violations, the NASD normally honors a stock's value as reflected on the firm's books.

Computations were also made by Mr. Woodruff, valuing Chipola at nineteen cents. Utilizing this valuation, as of July 10, 1981, IBI was still left with a negative net worth of $4,298,418.62. Its net capital was negative $5,451,489.05, with a net capital deficiency of $6,210,100.40.

At trial, values were also determined as of June 30, 1981. Using a valuation of Chipola at nineteen cents

per share, it was determined that, as of June 30, 1981, IBI had assets of $1,650,090.14 and liabilities of $1,316,093.30, reflecting a positive net worth of $333,936.84. This left IBI with a positive net capital of $76,884.13. However, it still left a net capital deficiency of $86,056.76. It also used the number of nine million to ten million shares in inventory, as of June 30, 1981.

Finally, computations were made at a figure of $.65625, apparently as of June 30, 1981. The closing bid price on Chipola stock on June 30, 1981 was $.65625. This reflected liabilities of $1,316,093.30, with assets of $2,506,707.95. Thus, a net worth existed in the amount of $1,190,614.65; and a positive net capital of $511,302.72.

All of Mr. Woodruff's computations involved "haircuts" (i.e., arbitrary deductions for safe, conservative figures). These haircuts varied in the amount of deductions from $109,192.79 to $366,178.13, depending upon whether

nineteen cents or $.65625 was used. The net worth figures were also manipulated by Mr. Woodruff by deducting various "nonallowable items as reflected on the books and records of the company.

Other values, involving different assumptions, were also the subject of testimony at trial. Two other expert witnesses were presented by the trustee in support of his contention that IBI was insolvent at the time the checks were negotiated to these defendants. One witness, Mr. Tom Kundinger, was a partner in the CPA firm of Peat, Marwick & Mitchell. The second was Mr. Roy Sandberg, a branch manager of Engler and Budd, a securities broker/dealer. The testimony of each of these witnesses would support the proposition that the sum of IBI's debts on July 10, 1981 was greater than the fair valuation of its property. However, it must be observed that Mr. Sandberg, for whatever reason, could not come to grips with what was meant by "market value", "true value", or "fair value." He assigned a value to

Chipola stock of $0.055, although as a trader he had paid sixty-five to seventy cents per share for it. This witness' testimony was of little help. My findings are primarily based upon the analysis conducted by Mr. Woodruff.

On July 8, 1981, Gilbert R. Davis was contacted by James Prude, a sales manager and registered representative of IBI, to represent the debtor and two of its officers, Belknap and Chandler, in matters before the SEC and in matters relating to the suspension of trading. Davis was not at any time retained to perform any work in the bankruptcy field. Davis went to Denver from Virginia, along with two other attorneys. The first was Frank Vecchio, an SEC attorney from Michigan, and the second was an attorney from Gnau, Carter & Jacobsen, a Washington political consulting firm.

A fee of $10,000 was arranged, to be divided among the three attorneys. Conferences were held on July 8 through 10, 1981. The evidence indicates the

parties and these attorneys were aware during the entire course of Davis' representation, of at least the possibility that the SEC would file a liquidation proceeding and seek injunctive relief against IBI in the United States District Court.

A retainer was agreed upon for further work, in the amount of $25,000. This fee included Davis' appearance at the hearing of July 10, 1981 on the SEC's application for injunction and the SIPC's action to liquidate IBI.

The evidence establishes that Davis received checks numbered 13417 and 13432 at about noon on July 10, 1981. These were promptly cashed into cashier's checks at the First National Bank of Denver. This transaction occurred at approximately 2:51 p.m. Davis claims to have learned of the SEC action which was to be taken that afternoon sometime subsequent to cashing these checks.

The O'Connor and Hannan checks were received at approximately 10:00 a.m. on July 10, 1984 and were cashed within one to one and one-half hours thereafter. One of the reasons these checks were taken to the bank immediately was due to the fact that O'Connor and Hannan had previously experienced an insufficient funds check from IBI. One of the checks, number 13418, was given to O'Connor and Hannan for previously rendered legal services. O'Connor and Hannan had represented IBI since 1980. IBI owed for prior legal services for the month of June 1981, as well as earlier months. Of the total amount of $25,659.80 reflected in check number 13418, the sum of $8,146.25 was attributable to legal services rendered in June of 1981, together with costs incurred in the amount of $71.30. The amount of $17,441.78 was attributable to legal services rendered in months prior to June 1981. This included $4,697.50 in legal fees, and costs of $1,879.65, in May, 1981; legal fees of $5,131.25 and costs of $874.67 in April, 1981; and legal fees

of $5,652.50, together with costs of $359.58 incurred in March, 1981. There were consistently balances due and owing on each monthly statement for several months prior to July 10, 1981. During this same period of time, IBI paid $10,000 on account in March and May, 1981. Check number 13419 was then paid to O'Connor and Hannan as a retainer "for legal services to be performed in connection with the trading suspension of Chipola" stock. These services appear to have been performed by O'Connor and Hannan from and after approximately July 1, 1981, and such time was ultimately credited against the retainer amount or was partially included in the July 10, 1981 billing.

Check number 13417 was paid to Gilbert Davis in the amount of $11,858.00. This was to cover consulting fees by Davis and others, all relating to the SEC investigation. The $25,000 check reflected in number 13432 was paid to Davis, Gillenwater and Lynch as a retainer in connection with the

suspension of Chipola stock and all other matters relating to the SEC investigation, "including involvement of NASD and/or SIPC."

At the hearing on July 10, 1981, Davis, along with O'Connor and Hannan, entered an appearance for the defendants IBI, Belknap and Chandler. That hearing resulted in the consent order, whereby IBI would not engage in any business whatsoever, other than the payment of rent, utilities and salaries of existing employees. The business to be terminated included, but was not limited to the following: "no disbursement of any funds, no transfer or disbursement of assets, no incurring of any liabilities, no transactions in securities and no settlement of any transactions."

On July 14, 1981, the SEC renewed its application for a preliminary injunction and request for the appointment of receiver. One of the grounds upon which this application was based was the issuance of the four

checks, as well as other checks, on July 10 through 13, 1981. It was contended by the SEC that the issuance of these checks was contrary to representations made by counsel for IBI at the July 10, 1981 hearing. It is clear that no evidence of those four checks was ever revealed to the SEC during the July 10, 1981 hearing or prior thereto.

Thereafter, the previously mentioned hearings of July 15, 1981 and July 20, 1981 took place.

CONCLUSIONS OF LAW

Several jurisdictional challenges have been interposed, seeking to prevent this court from exercising authority over the issues presented in this proceeding.

First, it is contended that the authority of bankruptcy judges ended on June 27, 1984, and that the retroactive provisions enacted by Congress in the bankruptcy amendments and Federal judgeship act of 1984 attempting to

continue the terms of bankruptcy judges was in controvention of Article II, §2 of the U.S. Constitution ("the Appointments Clause"). Secondly, the defendants allege that the bankruptcy amendments and Federal Judgeship Act of 1984, in enacting 28 U.S.C. §157, did not provide for the reference of matters brought under the Securities Investment Protection Act, 15 U.S.C. §78(aaa), et seq., from the U. S. District Courts to United States Bankruptcy Judges. Thirdly, defendants argue that SIPC trustees have no authority to pursue fraudulent transfers under 11 U.S.C. §548, since they have not been delegated that authority in the SIPA. Finally, it is argued that bankruptcy judges do not have jurisdiction to hear claims for preferences, In Re United Groceries of Nebraska Cooperative Inc., 46 B.R. 173 (Bankr. Neb. 1985) in support of this proposition.

I. Were the terms of bankruptcy judges constitutionally extended so as to continue to confer authority in the bankruptcy court?

The complaint in this adversary was filed on January 19, 1982. The matter came on for trial in August 1984, but was bifurcated and not completed until July 19, 1985.

The bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) was enacted on July 10, 1984. The transition period set forth in the bankruptcy act of 1978 was set to expire on March 31, 1984. Congress extended the transition on four separate occasions through a series of interim measures, with the final extension providing for the terms of office of bankruptcy judges to expire on June 27, 1984. P.L. 98-249, 98 stat. 116 [March 31, 1984], P.L. 98-271, 98 stat. 163 [April 30, 1984], P.L. 98-299, 98 stat. 214 [May 25, 1984], and P.L. 98325, 98 stat. 268 [June 20, 1984]. However, it must be noted that

the "holdover provisions" of §§ 404(b)(d), of the Bankruptcy Reform Act of 1978, P.L. 95-598, 92 stat. 268384 (1978) were in effect until enactment of the BAFJA of 1984. Section 404(b) provided:

> The term of a referee in bankruptcy who is serving on the date of an enactment of this [Bankruptcy Reform Act of 1978] is extended to and expires on March 31, 1984 or when his successor takes office (emphasis supplied).

The BAFJA purported to extend bankruptcy judges' terms of office from June 27, 1984 to the date of an enactment of the act, by virtue of §121(e) of that act. Then, in §106(a), it was provided as follows:

> ...the term of office of a bankruptcy judge who is serving on the date of an enactment of this Act is extended to and expires four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later.

The foregoing difficulties in resolving the authority and jurisdiction of bankruptcy courts has given rise to many challenges to the validity to the entire bankruptcy court system, including the contention that §121(e) attempts unconstitutionally and retroactively to create congressionally appointed bankruptcy judges in violation of the appointments clause of the Constitution of the United States, as reflected in our Article II, §2 of the Constitution.

The various courts who have considered this issue have uniformly rejected similar challenges to the authority of bankruptcy judges. In the Matter of Balwin United Corporation, 48 B.R. 49 (Bankr. S.D. Oh., W.D. 1985); In Re Tom Carter Enterprises, 44 B.R. 605 (Bankr. D.C. C.D. Cal. 1984); In Re Benny, 44 B.R. 581 (Bankr. D.C. N.D. Cal. 1984); In Re Wasatch Factory Inc., Miscellaneous B-0015W (D. Utah November 26, 1984); In Re Shearn Moody, Jr., Case No. M-84-90; B-8301490C-11 (D. Ct. Middle District N.C. 1985).

I see no reason from the arguments presented before me to deviate from the reasoned opinions set forth in these decisions. Therefore, the objection to the bankruptcy court's authority as a violation of the appointments clause of the United States Constitution is overruled.

II. Does the bankruptcy court have authority or jurisdiction to resolve disputes under the SIPA?

Defendants contend that in adopting the BAFJA of 1984, Congress neglected to provide for the referral of SIPA matters from the United States District Courts to the bankruptcy courts. This is, indeed, a troublesome contention.

As a part of the BAFJA of 1984, Congress enacted 28 U.S.C. §157 to provide a procedure for referral of bankruptcy cases and proceedings from the district courts to the bankruptcy judges for the district. Section 157 provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under §158 of this title.

SIPA matters are not "cases under title 11" and are not proceedings "arising under" or "arising in or related to a case" under title 11. SIPA matters arise under the Securities Investor Protection Act, 15 U.S.C. §78aaa, et seq. It can readily be seen that the Securities Investor Protection Act is not a title 11 matter. It is a title 15 matter. Further, I can not construe title 15 matters to be "related to" title 11 cases. I know of no decisions finding

that SIPA matters are proceedings arising under, arising in or related to title 11 cases. They have customarily been referred to referees in bankruptcy, and since 1978 referred to bankruptcy judges. The bankruptcy Reform Act of 1978 made certain amendments to conform salient portions of SIPA to the Bankruptcy Code. Section §78eee (b)(4) of SIPA provides:

> (4) REMOVAL TO BANKRUPTCY COURT Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made.

The BAFJA of 1984 was enacted only after great debate covering a period of two years. In that act, the Congress

chose to repose jurisdiction over title 11 matters in the United States District Courts. Thus, the district court is now "the court."

There has been no legislative action to invest bankruptcy judges with any jurisdiction over SIPA matters. The reference authority set forth in 28 U.S.C. §157 and that created by virtue of general procedure order number 1984-3 in this district only refer title 11 matters to bankruptcy judges.

The SIPC concedes that a literal construction of §78eee(b)(4) of the SIPA and §157 of the BAFJA must necessarily result in depriving bankruptcy judges of any authority or jurisdiction to decide anything under a SIPA proceeding. There is simply no presently existing statutory authority for removal of a SIPA case from the district court to a bankruptcy judge. Nonetheless, the SIPC argues that Congress' clear intent has long been to require that all matters in a SIPA case be determined by the bankruptcy courts.

Citing much legislative history, the SIPC then urges that the bankruptcy court has jurisdiction under SIPA. It is further asserted that a literal interpretation of present statutes would result in an absurdity of requiring district courts to "remove" SIPA cases to themselves. "All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative." United States v. Ryan, 284 U.S. 167 76 L. Ed. 224, 52 S. Ct. 65. (1931).

There are several difficulties with the proposition advanced by SIPC. First, it must be observed that much of what Congress promulgated in the 1984 BAFJA results in absurdity. This is but one example. To uphold the SIPC's line of reasoning on this issue would result in conferring jurisdiction in the bankruptcy judges over title 15 matters by way of removal "to the court of United States...having jurisdiction over cases

under title 11" when bankruptcy judges do not even have jurisdiction over the cases under title 11." See, In Re Herrara, supra. This, to, is an absurd result.

Further, resorting to legislative history is only appropriate where the language of a statute is ambiguous. In Re Galvan, 39 B.R. 663 (D.C. Colo. 1984). Where the language of a statute is clear, use of committee reports, legislative comments, and the like is unnecessary. Id., at page 665. "It is presumed that when Congress drafts a statute it does so with full knowledge of the existing law;... Id., at 665. There is no ambiguity in any of the language of statutes under consideration here. Clearly, only title 11 cases and matters relating to, or arising in or out of title 11 cases may be referred to bankruptcy judges under legislation promulgated by the Congress. Had Congress desired to include title 15 matters in the legislative reference allowance, it only needed to include a sentence in 28 U.S.C. §157 so providing.

Congress had two years leading up to promulgation of the BAFJA, and it has now had an additional year since that time. No changes have been made.

I know of no authority giving the court the power to second guess what Congress might, or should have done, simply because a judge thinks it should have been so. Perhaps Congress did not want bankruptcy judges to assume responsibility of over SIPA matters, and merely failed to conform the SIPA to the 1984 BAFJA. This is at least as plausible an explanation as to assume Congress forgot to include a SIPA reference provision in BAFJA.

In the absence of legislation conferring jurisdiction on bankruptcy judges over SIPA matters or a reference from the district court authorizing bankruptcy judges to exercise the district court jurisdiction, bankruptcy judges are without authority over non-title 11 matters.

SIPC also contends that SIPA matters are really "core" proceedings arising directly out of §§327, 329, 547, and 548 of title 11. No authority is cited for this contention. I have found none. It is true the powers of a SIPA trustee include those possessed by a trustee in a case under title 11. 15 U.S.C. §78fff-1(a). These include many core matters under the bankruptcy code. However, the powers of the trustee is a separate consideration from determining what court shall exercise jurisdiction over a SIPA liquidation proceeding. Thus, I can not conclude that a SIPA liquidation proceeding under title 15 of the U.S. Code is nothing more than a core proceeding under 28 U.S.C. §157.

Based on the foregoing discussion and authority, I would conclude that bankruptcy judges are without jurisdiction or authority to rule on the matters presently before me. However, recognizing that legal analysis and authority has previously been strained and stretched to save the bankruptcy

court system where Congress has failed to act, it is possible that, on appeal, analysis by an appellate court may create authority where I have found none to exist. Therefore, I shall proceed to a resolution of other issues in the event the requisite authority is provided on appeal.

III. Does the bankruptcy court have jurisdiction or authority to resolve 11 U.S.C. §§547 or 548 matters in a SIPA proceeding?

The defendants contend that a SIPA trustee does not have authority to bring actions seeking to avoid transfers under 11 U.S.C. §§547 or 548. The primary authority upon which defendants rely on support of their §547 argument is In Re Associated Groceries of Nebraska Cooperative, Inc., supra. (Bankr. Neb. 1985). In support of their position that a SIPA trustee lacks authority to bring an action under §548, defendants point out that the purposes of a "liquidation proceeding" under SIPA are enumerated in

15 U.S.C. §78fff(a), and that these purposes do not include fraudulent transfer action sunder 11 U.S.C. §548. Defendants cite 15 U.S.C. §78 fff1(a), which provides, in part:

> A trustee shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under title 11.

As can be seen from the foregoing, no mention is made of fraudulent transfers. Thus, we are faced with another resolution of what authority Congress intended to confer.

With respect to the authority of a SIPA trustee to pursue a §547 preference action, the bankruptcy court In Re Associated Groceries of Nebraska Cooperatives, Inc., supra, held that a preference determination between the debtor and the defendant involves the

adjudication of purely private rights which, absent consent of the parties, must be tried to an Article III court under Northern Pipeline Construction Co., v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed. 2d 598 (1982). A motion to dismiss a preference action under §547 of the Code was granted, inspite of the clear listing of such an action as a core proceeding under 28 U. S. C. §157(b)(2)(F). It was determine that the bankruptcy court had no jurisdiction over the matter. There was no discussion of the authority of the bankruptcy court to administer the matter as a related proceeding, submitting proposed findings of fact and conclusions of law to the district court.

I know of know other decisions following In Re Associated Groceries of Nebraska Cooperatives, Inc.. I do not believe the Supreme Court of the United States intended to go that far, and I decline to follow Associated Groceries.

With respect to the authority of a SIPA trustee to pursue fraudulent transfers under 11 U.S.C. §548, there is a ample authority in support of such an action. Securities Investor Protection Corporation v. S.J. Salmon & Co. Inc., Case No. 72 Civ. 560 (S.D. N.Y. 1973); 3 Collier on Bankruptcy, paragraph 60.85 at page 1246 (14th Ed. 1977).

Such actions by SIPA trustees seeking to recover estate property routinely have been brought, both under the bankruptcy code of 1978 and the earlier bankruptcy act. See, e.g. In Re Bell & Beckwith 44 B.R. 656 (Bankr. N.D. Oh. 1984); Klein v. Tabatchnik, 418 F. Supp. 1368 (D.C. S.D. N.Y. 1976), aff'd in part and reversed in part on other grounds, 610 F. 2d 1043 (2d Cir. 1979). I can find no provisions in the BAFJA or the SIPA which would case me to feel the results should be other wise at this time. Thus, I conclude that the trustee does have authority to pursue preference actions under §547 as well as fraudulent

transfers under §548 of the Bankruptcy Code.

Other challenges to the authority of this court or the authority of the trustee I conclude to be without merit.

SUBSTANTIVE ISSUES

I. Has there been a voidable preference under 11 U.S.C. §547?

Under §547 of the Code, a preference can be avoided where there has been a transfer of property, on or within ninety days prior to filing a petition under title 11, to a creditor on an account of antecedent debt, owed by the debtor before such transfer was made, while the debtor was insolvent, which enables such creditor to receive more than he would have received had the transfer not been made. There is a presumption under §547(f) that the debtor is insolvent on and during the ninety days immediately preceding the date the petition is filed.

The liquidation petition was filed on July 10, 1981. The disputed checks were transferred and cashed on that same day, just shortly prior to filing the petition. It is the trustee's contention that check number 13418 in the amount of $25,659.80 to O'Connor and Hannan and check number 13417 in the amount of $11,858 to Davis constitute voidable preferences under §547 of the Code.

In addition to vigorously contesting the issue of insolvency, the defendants postulate certain affirmative defenses. Under these affirmative defenses, defendants argue that they fall under the exemptions provided by §547(c)(1) as a contemporaneous exchange for new value, and that the payments made to them were made in the ordinary course of business as provided in §547(c)(2).

A. Payment to O'Connor and Hannan

It is clear that the payment of $25,659.80 represented in check number 13418 to O'Connor and Hannan was for an

antecedent debt. The real disputes centers around whether the debtor was insolvent at the time the transfer was made.

In addition to the presumption of insolvency, there was ample evidence presented by the trustee indicating insolvency on July 10, 1981. I could not conclude that any amount in excess of nineteen cents could legitimately be used to determine the value of Chipola stock as of July 10, 1981. The evidence convinces me that any amount beyond nineteen cents was the result of manipulative procedures by the principals of IBI. I also conclude that valuing Chipola stock at zero is the result of manipulation by the government. Thus, such a valuation would likewise be unfair. The values which were the subject of testimony by Messrs. Sandberg and Kundinger are not persuasive.

Valuing Chipola stock at nineteen cents per share, on July 10, 1981 IBI was insolvent.

The final question to be examined, prior to reviewing the exceptions to §547, is whether the creditor received more than it would have received if the case were a case under Chapter 7, the transfer had not been made and the creditor had received payment to the extent provided by the provisions of the Code. Here it becomes necessary to examine the right of O'Connor and Hannan to receive payment on these fees in light of §329 of the Code.

The services rendered which are represented by check number 13418 were for legal services rendered prior to and not in contemplation of or in connection with the SIPA action. They were also subject to a valid attorneys' lien, as provided in C.R.S. §12-5-119 (1973). Such a lien is a statutory lien and not a judicial lien. Thus, the lien is not avoidable under 11 U.S.C. §522(f).

A creditor who receives payment on a secured claim has not been preferred simply because he realizes the value of

his collateral earlier than if he had waited until liquidation. Such payments do not deplete the debtor's estate, and thereby deprive other creditors of their rights to payment from the estate. In Re Hawkins Manufacturing Inc., 11 B.R. 512 (Bankr. Colo. 1981).

O'Connor and Hannan also contend that they fall within one of the exceptions provided in §547(c)(1) or (2). Payment is, of course, insulated from attack as a preference if the creditor establishes that he comes within one of these exceptions. In Re Auto Train Corporation, 49 B.R. 605 (D.C. 1985); In the matter of Advance Glove Manufacturing Co., 42 B.R. 489 (Bankr. Ed. Mich. S.D. 1984).

I conclude that the payment here involved does not fall within the exception of §547(c)(1) as a contemporaneous exchange for new value. The contention is made by the trustee that since trading had been suspended and IBI was doing no business on July 10,

1981, the payment could not have been made in the ordinary course of business, as contemplated in §547(c)(2).

However, the suspension in trading on July 2, 1981, did not mean that IBI could not conduct any business whatsoever, such as paying its bills and employees; nor did such suspension in trading nullify debts previously incurred by IBI and the ordinary course of business. I conclude, from the evidence before me, that the payment of check number 13418 to O'Connor and Hannan was, indeed, in payment of a debt incurred by IBI in the ordinary course of its business, was made in the ordinary course of the business and financial affairs of IBI and O'Connor and Hannan, and was made according to ordinary business terms. The fact that O'Connor and Hannan took the unusual step of immediately cashing this particular check does not detract from this result.

II. Payment to Davis of check number 13417 in the amount of $11,858

The law previously discussed as applicable to the payment to O'Connor and Hannan is likewise applicable to Davis. However, there are certain factual differences which make the result different.

The extension of credit in Davis' case was for only a few days. Nonetheless, this constituted an antecedent debt, no matter how brief the extension of credit. Engelkes v. Farmers Cooperative Co., 194 F. Supp. 319 (N.D. Iowa 1961). Services rendered were for the period of time spanning July 8, 9, and the morning of July 10, 1981.

The evidence convinces me that all of the services rendered by Davis and by Davis, Gillenwater & Lynch were in contemplation of or in connection with the SIPA case and its anticipated filing. Accordingly, §329 of the Code is applicable, and Davis has failed to

establish compliance with that section. This destroys any possible exception to avoidance under §547(c)(2). Further, most, if not all, of the representation provided by Davis and Davis, Gillenwater & Lynch was for individuals and not for IBI.

I conclude this payment is subject to avoidance as a preference.

IV. Were the transactions herein involved voidable as fraudulent conveyances under11 U.S.C. §548?

The trustee seeks to set aside and have returned to the estate the $25,000 retainer paid to O'Connor and Hannan in check number 13419 and the $25,000 retainer paid to Davis, Gillenwater & Lynch represented by check number 13432. The trustee contends that these payments constituted fraudulent transfers under 11 U.S.C. §548.

The Bankruptcy Code provides two definitions of fraudulent transfers under

§548. The first requires a showing that the transfer was made with actual intent to hinder, delay or defraud creditors. The second, an alternative definition, is that the debtor received less than a reasonably equivalent value in exchange for the transfer at a time when the debtor was insolvent or was engaged in business or about to engage in business for which any property remaining constituted an unreasonably small capitol, or intended to or believed it would incur debts beyond its ability to pay as such debts matured. The trustee primarily relies upon the second definition.

In proceedings under §548 of the Code, the burden of proof is on the trustee to establish the fraudulent conveyance. In Re Ears, Nose & Throat Surgeons of Worcester, Inc., 49 B.R. 316 (Bankr. Mass. 1985); 4 Collier on Bankruptcy, §548.10 at page 548-111, 112 (15th Ed. 1985).

To set aside a transfer under §548(a)(2), four elements must be established. It must be shown that 1) there was a transfer of an interest of the debtor and property, 2) which occurred within one year of the filing of bankruptcy, 3) that the debtor received less than a reasonably equivalent value and exchange for this transfer, and 4) that the debtor was insolvent on the date of the transfer, became insolvent as a result, or was left with an unreasonably small capitol. In Re Ear, Nose & Throat Surgeons of Worcester, Inc., supra; In the Matter of Curtina International Inc., 23 B.R. 969 (Bankr. S.D. N.Y. 1982).

Contrary to the contentions made by O'Connor and Hannan in its trial brief, there need not always be a pernicious intent, involving moral turpitude, in a fraudulent conveyance under §548. Indeed, that is not a necessary element at all under §548 (a)(2).

There is no dispute that the transfers were made to Davis, and to

O'Connor and Hannan within one year of filing the petition. I have already determined that IBI was insolvent on July 10, 1981, the date of the transfers. The question to be addressed is whether IBI received less than a reasonably equivalent value in exchange for the transfers represented by these retainer fees.

The question of reasonable equivalents should be determined in light of the function of §548, which is to achieve an equitable distribution of the debtor's property. In Re Richardson, 23 B.R. 434 (Bankr. Ut. 1982). What the debtor received in exchange for the retainers was the agreement of counsel to represent the debtor in the contemplated SIPA proceeding. There are several reasons why these payments are subject to avoidance under §548(a)(2). First, since the representation to be rendered was in contemplation of or in connection with the case which was filed that day, both O'Connor and Hannan and Davis,

Gillenwater & Lynch needed to comply with §329 of the Bankruptcy Code. This does not appear to have been done. The lack of a statement of compensation paid, is required by §329(a), impinges upon the courts ability to pass upon the reasonableness of fees in connection with representation in the liquidation proceeding. Further, no representation of the trustee is authorized except by appointment under §327 of the Bankruptcy Code. Representation of the debtor, not as a debtor-in-possession or a trustee, need not receive the sanction of the court. However, compensation of the debtor's attorney is governed by §330 of the Code if payment is to come from funds of the estate. These avenues are still available to counsel for the debtor. However, the retainers received on July 10, 1981 short circuited the aforementioned provisions. An additional reason for disgorging the fees received by way of retainer is that at least some of the services rendered thereafter were rendered for individuals. Additionally, most of the services rendered were for

the purpose of resisting the petition for a SIPC liquidation and to avoid the SECC's application for a preliminary injunction. These services are generally considered to benefit the individual principals and officers of the company. Thus, they are not compensible from the estate. Securities and Exchange Commission v. Capitol Counselors Inc., 378 F. Supp. 224 (S.D.N.Y. 1974), aff'd 512 F. 2d 654 (2d Cir. 1975); Securities and Exchange Commission v. Allen F. Hughes, Inc., 481 F. 2d 401 (2d Cir. 1973), cert. denied 414 U.S. 1092 (1973). I can not tell from the evidence what portion of the fees were attributable from individual representation and what portion would be attributable to representation of the debtor or the trustee, if such representation was authorized by the court.

I conclude that there was no reasonably equivalent value, as of July 10, 1981, given by either O'Connor and Hannan or Davis, Gillenwater & Lynch to

IBI in exchange for the two retainer checks, each in the amount of $25,000.

Based upon the foregoing discussion and authority, I conclude that the retainer checks for $25,000, represented by checks numbered 13419 and 13432 should be subject to avoidance under 11 U.S.C. §548(a)(2).

Finally, I find no merit to further affirmative defenses or counterclaims alleged by the defendants.

CONCLUSION

Based upon my conclusion that bankruptcy judges are without authority to decide SIPA matters, this matter will be and is dismissed. The remainder of this opinion shall constitute the findings and conclusions of this court in the event proper authority is found to exist in the bankruptcy court. In such event, it is my conclusion that check number 13418 in the amount of $25,659.80 payable to O'Connor and Hannan is not

subject to avoidance as a preferential transfer, and judgment shall enter in favor of O'Connor and Hannan on the claim. Check number 13417 in the amount of $11,858, payable Gilbert K. Davis, is subject to avoidance as a preferential transfer. Check number 13419 in the amount of $25,000, payable to O'Connor and Hannan is subject to avoidance as a fraudulent transfer under 11 U.S.C §548(a)(2). Check number 13432 in the amount of $25,000, payable to Davis, Gillenwater & Lynch, is subject to avoidance as a fraudulent transfer under 11 U.S.C. §548(a)(2).

IT IS SO ORDERED

DATED: DECEMBER 20, 1985.
BY THE COURT

JAY L. GUECK, Judge

Article III Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

15 U.S.C. § 78eee(b). Protection of customers

(4) Removal to bankruptcy court. Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the

removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11 (11 U.S.C. §101 et seq.). The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this Act upon the court to which application for the issuance of the protection decree was made.

Section 115 to the Bankruptcy Amendments and Federal Judgeships Act of 1984 provides:

> Sec. 115.(a) On the date of the enactment of this Act the appropriate district court of the United States shall have jurisdiction of --

(1) cases, and matters and proceedings in cases, under the Bankruptcy Act that are pending immediately before such date in the bankruptcy courts continued by section 404(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2687), and

(2) cases under title 11 of the United States Code, and proceedings arising under title 11 of the United States Code or arising in or related to cases under title 11 of the United States Code, that are pending immediately before such date in the bankruptcy courts continued by section 404(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2687).

(b) On the date of the enactment of this Act, there shall be transferred to the appropriate district court of the United States appeals from final judgments, orders, and decrees of the bankruptcy courts pending immediately before such date in the bankruptcy appellate panels appointed under section 405(c) of the Act of November 6, 1978. (Public Law 95-598; 92 Stat. 2685)

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title

11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to -- . . .

(F) proceedings to determine, avoid, or recover preferences; . . .

(H) proceedings to determine, avoid, or recover fraudulent conveyances; . . .

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provision of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful

death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating

organizations or activities affecting interstate commerce.

28 U.S.C. § 1334 provides:

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated,

in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Bankruptcy Rule 8013 provides:

> **Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact**
>
> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

11 U.S.C. § 329(a) provides:

> **Debtor's transactions with attorneys**
>
> (a) Any attorney representing a debtor in a case under this title, or in

connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12 or 13 of this title; or

(2) the entity that made such payment.

No. 93-956 (3)

Supreme Court, U.S.
FILED
JAN 18 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; and GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

vs.

JAMES H. TURNER, TRUSTEE, and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

In July 1981, Investment Bankers, Inc. ("IBI"), a securities broker-dealer, remitted checks totalling $36,858 to Gilbert K. Davis, Esquire, and his law firm, Davis, Gillenwater & Lynch ("DG&L"). A couple of days before receiving the checks, Mr. Davis and his firm had been retained by IBI and two of its principals in connection with an impending suit against them by the Securities and Exchange Commission ("SEC") for alleged stock manipulation and failure to meet financial responsibility requirements. The checks were remitted on the same day that the SEC actually filed its complaint in district court against IBI and its principals, and were for services rendered over the past two days and a retainer for future services. That day, the SEC also obtained an order which prevented IBI from doing business and limited its disbursement of funds. Prior to the hearing resulting in the entry of that order, Mr. Davis converted the checks received from IBI to cashier's checks.

Concurrently with the filing of the SEC complaint, the Securities Investor Protection Corporation ("SIPC") filed in district court an application for a customer protective decree as to IBI, under the Securities Investor Protection Act, 15 U.S.C. §78aaa *et seq.* ("SIPA"). The application was granted five days later, and resulted in IBI being placed in liquidation under SIPA, the appointment of James H. Turner, Esquire, as trustee, and the removal of the liquidation proceeding to the bankruptcy court under SIPA section 78eee(b)(4).* In early January 1982, Mr. Turner sued Mr. Davis and DG&L in bankruptcy court, to avoid the payments to them as preferences or fraudulent conveyances under sections 547 and 548 of the Bankruptcy Code, 11 U.S.C. §§547 and 548, and as having been made in violation of sections 327 and 329 of the Code, 11 U.S.C. §§327 and 329. Each of the foregoing sections of the Code

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* For convenience, references herein to provisions of SIPA shall be to the United States Code, and shall omit "15 U.S.C."

applied by reason of SIPA section 78fff(b). While agreeing that the transfers were otherwise avoidable and improper under the Code, the Bankruptcy Court concluded that it lacked jurisdiction over the dispute, in view of the Bankruptcy Amendments and Federal Judgeship Act of 1984. On appeal, both the District Court and Court of Appeals disagreed with the Bankruptcy Court as to jurisdiction. Thus, the issue is

> Whether bankruptcy courts have jurisdiction to consider adversary proceedings that are brought within SIPA liquidation proceedings and that arise under provisions of the Bankruptcy Code where
>
> 1) SIPA section 78eee(b)(4) requires removal of the SIPA liquidation proceeding to the bankruptcy courts;
>
> 2) the action in question arises under sections 327, 329, 547 and 548 of the Bankruptcy Code, made applicable by SIPA section 78fff(b) which, in relevant part, requires that to the extent consistent with SIPA, the SIPA liquidation proceeding "be conducted in accordance with, and as though it were being conducted" under specified sections of the Bankruptcy Code, including sections 327, 329, 547 and 548, and there is no inconsistency between those sections and SIPA; and
>
> 3) the defendants filed a claim in the SIPA liquidation proceeding before the Bankruptcy Court and counterclaims in the instant adversary proceeding also before the Bankruptcy Court, thereby consenting to that court's jurisdiction.

LIST OF PARTIES

The parties to the proceeding are as stated in the Petition for Writ of Certiorari, except as follows:

1) O'Connor and Hannan, and not O'Connor and Hannon;** and

2) the Securities Investor Protection Corporation ("SIPC"), and not the Securities *Investment* Protection Corporation.

SIPC is created pursuant to a federal statute, and has no parent companies or subsidiaries.***

** The law firm of O'Connor & Hannan was named as a co-defendant in the suit, but has since fully satisfied its obligation to the Trustee.

*** SIPC's participation in this matter has been pursuant to SIPA section 78eee(d). In pertinent part, under that provision, SIPC is a party in interest as to all matters arising in a SIPA liquidation proceeding, "with the right to be heard on all such matters."

RELEVANT STATUTORY PROVISIONS

There is no issue presented under the Seventh Amendment to the United States Constitution in this case and therefore, the petitioners' citation of the Amendment at page 3 of the Petition for Writ of Certiorari is inappropriate.

In addition to the other provisions of law identified by the Petitioners, the following are applicable:

1) 15 U.S.C. §78bbb;

2) 15 U.S.C. §78eee(b)(4), *prior to amendment* (1978);

3) 15 U.S.C. §78fff(b);

4) 11 U.S.C. §547(b);

5) 11 U.S.C. §548(a);

6) 1 U.S.C. §204(a)

The foregoing provisions are set forth in the statutory appendix to this brief.

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Pub. L. No. 95-598, 92 Stat. 2668 (1978)	3
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Pub. L. No. 95-598, 92 Stat. 2675 (1978)	11
Pub. L. No. 96-433, 94 Stat. 1855 (1980)	7
Pub. L. No. 97-303, 96 Stat. 1409 (1982)	7
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Pub. L. No. 98-353, 98 Stat. 340 (1984)	2,3
Pub. L. No. 100-181, 101 Stat. 1265 (1987)	7
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 1613, 91st Cong., 2d Sess. (1970)	21
S. Rep. No. 989, 95th Cong., 2d Sess. (1978)	13
S. Rep. No. 763, 95th Cong., 2d Sess. (1978)	13
130 Cong. Rec. H1848 (daily ed. March 21, 1984)	24
116 Cong. Rec. 20334 (1970)	21
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PUBLICATIONS AND TREATISES:	
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1 *Collier on Bankruptcy* (15th ed. 1992) ¶3.01	26
Anthony Michael Sabino, *The Role of Bankruptcy Courts in Stockbrokerage Liquidations*, 16 Sec. Reg. L. J. 227 (Fall 1988)	12

IN THE

Supreme Court of the United States

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Petitioners,

vs.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

On July 15, 1981, upon an application by SIPC, the United States District Court for the District of Colorado ("District Court") placed Investment Bankers, Inc. ("IBI" or "the Debtor") in liquidation under SIPA, and appointed James H. Turner, Esquire, as trustee to administer the liquidation. Pursuant to SIPA section 78eee(b)(4), the District Court removed the liquidation proceeding to the Bankruptcy Court for the same district ("the Bankruptcy Court").

Consistent with SIPA section 78fff-2(a)(1) and with the Bankruptcy Court's permission, the Trustee caused notice of the liquidation proceeding to be published, and had cop-

ies of the notice and claims materials mailed to customers and other creditors of the Debtor. On September 1, 1981, the Trustee received a claim from Petitioner Davis for a cash credit balance and some securities. In the claim, he disclosed that he was an attorney who had represented the Debtor and its principals. The Trustee did not determine the claim. Instead, on January 19, 1982, based on 28 U.S.C. §1471 and SIPA section 78fff(b), the Trustee commenced the instant adversary proceeding in the Bankruptcy Court, based on the Debtor's transfer of $36,858 to the petitioners on the day that SIPC filed the application to have the firm placed in liquidation. The petitioners answered and counterclaimed. A8-A11.[1]

A trial was held in August 1984 and July 1985. On December 10, 1985,[2] the Bankruptcy Court filed a Memorandum Opinion and thereafter entered judgment. A11, A115.

The court concluded that it lacked jurisdiction in view of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). A139-A147. Under 28 U.S.C. section 157 which is part of the BAFJA, Pub. L. No. 98-353, 98 Stat. 340 (1984), only Title 11 cases, and proceedings arising under or in or related to cases under Title 11, may be referred to bankruptcy judges. In the court's view, the adversary proceeding arose under SIPA, which is contained in Title 15 and not Title 11 of the United States Code. The court rejected SIPC's contention that SIPA section 78eee(b)(4) provided a basis for removal to it of the adversary proceeding. It also disagreed that section 78eee(b)(4) should be interpreted so as to effectuate the legislative intent. The bankruptcy judge stated:

> It is further asserted that a literal interpretation of present statutes would result in an absurdity of re-

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[1] References herein to pages of the Appendix shall be to "A___." References to the Petition for Writ of Certiorari shall be to "Cert. Pet."

[2] The "reprint" of the Memorandum Opinion in the Petitioners' Appendix incorrectly reflects the date as December 20, 1985. See A165.

> quiring district courts to "remove" SIPA cases to themselves. ". . . A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative." [*Sic*] . . . .
>
> There are several difficulties with the proposition advanced by SIPC. *First, it must be observed that much of what Congress promulgated in the 1984 BAFJA results in absurdity. This is but one example* . . . . [emphasis added and citation omitted]

A143. Finally, the court failed to consider the effect of SIPA section 78fff(b) upon its jurisdiction.

Section 78eee(b)(4) had been made unclear as a result of the enactment of the BAFJA. In relevant part, the SIPA section required removal to "the court of the United States in the same judicial district having jurisdiction over cases under title 11." Under the Bankruptcy Reform Act of 1978 ("1978 Reform Act"), the latter courts were the bankruptcy courts. Pub. L. No. 95-598, 92 Stat. 2668 (1978); *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50, 54 n.3 (1982) ("*Marathon*"). In that context, the intent of section 78eee(b)(4) was plain: SIPA proceedings were to be removed from the district court in which the SIPC application had been filed to the bankruptcy court for the same district. However, in the aftermath of *Marathon*—with the substitution of the jurisdictional provisions of the BAFJA for those of the 1978 Reform Act—the meaning of section 78eee(b)(4) was obscured. Because the courts with ultimate jurisdiction over Title 11 cases were now the district courts, see Pub. L. No. 98-353, 98 Stat. 333 and 340 (1984), a literal application of section 78eee(b)(4) would have required the district court to remove the proceeding to itself.

Although section 78eee(b)(4) had become facially meaningless, the Bankruptcy Court refused to discern and apply the legislative intent, stating that a provision requiring a

court to remove a proceeding from itself to itself is not ambiguous:

> Further, resorting to legislative history is only appropriate where the language of a statute is ambiguous .... Where the language of a statute is clear, use of committee reports, legislative comments, and the like is unnecessary .... *There is no ambiguity in any of the language of statutes under consideration here.* [Emphasis added and citations omitted]

A144. In spite of the finding of lack of jurisdiction, the court proceeded to decide the merits of the case in the event that it was mistaken as to its jurisdiction. It concluded that a $25,000 retainer paid to the petitioners was voidable as a fraudulent transfer under 11 U.S.C. §548(a)(2), and that a payment of $11,858 to them was voidable as a preference under 11 U.S.C. section 547 and as not in compliance with 11 U.S.C. section 329. A157-A164.

On appeal, the finding as to jurisdiction was reversed. A1-A106.

SUMMARY OF ARGUMENT

This Court should not grant the petition for a writ of certiorari for the following reasons:

1. There is no conflict between the decision of the Tenth Circuit and of any other court. At bottom, SIPA liquidation proceedings are ordinary bankruptcy proceedings with special customer protection features. There is substantial authority in SIPA for the removal of such proceedings to the bankruptcy courts, and for the consideration by the latter courts of adversary proceedings brought within them. Thus, once the district court places the broker-dealer in SIPA liquidation, it must remove the proceeding to the bankruptcy court under SIPA section 78eee(b)(4). Furthermore, SIPA section 78fff(b) mandates that the SIPA proceeding be conducted not only in accordance with, but *as though* it were being conducted under specified provi-

sions of the Bankruptcy Code, including those that are at issue. Finally, 28 U.S.C. section 157(b)(1) supplies another basis for jurisdiction. The Bankruptcy Court had jurisdiction under that section because the instant adversary proceeding not only is a core proceeding arising under provisions of Title 11, made applicable by SIPA section 78fff(b), but because it arises in a case under Title 11. The SIPA liquidation proceeding is a Title 11 *and* Title 15 case.

2. Petitioners never requested a jury trial in this case, and accordingly, they inappropriately rely upon *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (*"Granfinanciera"*). The authority of the Bankruptcy Court to consider this adversary proceeding was reinforced by the petitioners' filing of a claim against the Debtor's estate and of counterclaims for payment from the estate. As a result, the instant suit became an integral part of the restructuring of the debtor-creditor relationship subject to the jurisdiction of the Bankruptcy Court.

3. Petitioners raise no question worthy of review. The issue is significant only to the parties involved, and has no importance beyond the narrow confines of SIPA cases.

ARGUMENT

This adversary proceeding was brought within the context of a SIPA liquidation proceeding. Because an understanding of the nature of the proceeding is critical to a proper resolution of the petition, the history of SIPA, as well as its purposes and relevant provisions, are examined below. That examination shows that at bottom, the proceeding is no more than an ordinary bankruptcy liquidation case, with special customer protection features.

Nature of a SIPA Proceeding: Its History and Purposes

Prior to 1938, customers of a bankrupt stockbroker were considered as general creditors if they could not reclaim cash or securities which they could trace into the broker's possession. *Duel v. Hollins*, 241 U.S. 523, 527-29 (1916).

Because serious inequities could and did result from this method of reclaiming, Congress enacted section 60(e) of the Bankruptcy Act in 1938.

A. Section 60(e) of the Bankruptcy Act

Section 60(e) of the former Bankruptcy Act, 11 U.S.C. §96(e) (repealed 1979), permitted "cash customers," as defined therein, to reclaim fully paid securities which were "specifically identifiable" as their property. Otherwise, customers' cash, securities or property of a similar character (not "specifically identifiable") constituted a "single and separate fund" to be applied in satisfaction of customers' claims (other than for specifically identifiable property) on a *pro rata* basis, subject only to prior payment of certain administrative expenses. As for the unpaid balance of their "net equities," customers shared with general creditors in the general estate. See 3 *Collier on Bankruptcy*, ¶¶60.71-60.76 (14th ed. 1977).

Because of the usually inadequate single and separate fund, section 60(e) did not prevent customer losses. Customer exposure mounted when the rate of stockbroker failures accelerated in the 1960s. Congress responded to the crisis by enacting SIPA. *SIPC v. Barbour*, 421 U.S. 412, 415 (1975).

B. SIPA and SIPA as Amended

With some adjustments, SIPA expressly continued the substantive scheme of section 60(e). Customers were still entitled to the return of their "specifically identifiable property," and to their share of the single and separate fund. §78fff(c)(2)(A)—(C) (1970). The major impact of SIPA on customer recoveries was to reduce losses by providing a limited back-up through SIPC funds. In essence, SIPA improved "collectability" while adhering to the section 60(e) philosophy of according customers limited preferential rights based on their actual securities and cash positions entrusted to the broker.

In 1978, SIPA was amended to provide greater flexibility to SIPC in satisfying customer claims in an expe-

ditious fashion.[3] The essential elements of a SIPA proceeding remained unchanged.

C. SIPC and Its Funds

SIPC is a non-profit corporation whose members include most interstate broker-dealers. §78ccc(a)(2)(A).

SIPA requires SIPC to establish a fund via assessments upon its members. §78ddd(a)(1). If the fund should become inadequate, SIPA authorizes a borrowing against the U.S. Treasury of up to one billion dollars. §78ddd(f)—(h). These resources are available for the satisfaction of customer claims within certain limits.

D. Use of SIPC Funds to Satisfy Customer Claims

SIPA requires the distribution of "a quasi-public fund." *SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 980 (2d Cir. 1974). Under section 78fff-3(a), SIPC is authorized to advance to the trustee, in order to satisfy net equity claims of customers, up to $500,000 per customer of which no more than $100,000 may be used to satisfy a claim which is for cash rather than for securities. Regardless of the assets of the failed firm, each customer eligible for protection is assured of satisfaction within the SIPA limits. However, SIPA does not attempt to make all customers whole and SIPC's role is carefully delineated. It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets of the defunct member firm. §78fff-2(c)(1). To the extent of its advances, SIPC is subrogated to the claims of such customers. §78fff-3(a). *See SIPC v. Associated Underwriters, Inc.*, 423 F.Supp. 168, 170-173 (D. Utah 1975).

E. Bankruptcy Nature of a SIPA Proceeding

It is useful to consider SIPA as an "engraftment of insurance provisions upon the preexisting Section 60(e)

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[3] SIPA has been amended by Pub. L. No. 95-283, 92 Stat. 249 (1978); Pub. L. No. 95-598, 92 Stat. 2549 (1978); Pub. L. No. 96-433, 94 Stat. 1855 (1980); Pub. L. No. 97-303, 96 Stat. 1409 (1982); and Pub. L. No. 100-181, 101 Stat. 1265 (1987).

bankruptcy provisions applicable to stockbrokers. . . ." *SEC v. Aberdeen Securities Co.*, 480 F.2d 1121, 1123 (3d Cir.), *cert. den. sub nom., Seligsohn v. SEC*, 414 U.S. 1111 (1973). Thus, notwithstanding the special protection afforded customers, a proceeding under SIPA essentially is a bankruptcy liquidation. See, *e.g.*, *SIPC v. Ambassador Church Finance/Development Group, Inc.*, 788 F.2d 1208, 1210 (6th Cir.), *cert. den. sub nom., Pine Street Baptist Church v. SIPC*, 479 U.S. 850 (1986); *SEC v. Albert & Maguire Sec. Co.*, 560 F.2d 569, 572 (3d Cir. 1977); *Exchange National Bank v. Wyatt*, 517 F.2d 453, 457-459 (2d Cir. 1975). Indeed, one of the stated goals of the proceeding is "to liquidate the business of the debtor." SIPA §78fff(a)(4). The application to commence a proceeding is filed by SIPC in federal district court, §78eee(a)(3), which puts into effect the Bankruptcy Code's automatic stay. 11 U.S.C. §362(a). If the court grants the application, it appoints a trustee to administer the liquidation and removes the proceeding to the bankruptcy court for that district. §78eee(b)(3) and (b)(4). To the extent consistent with SIPA, the SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7" of the Bankruptcy Code. §78fff(b).

Because the SIPA proceeding effectively is a bankruptcy proceeding, it looks not only to the disposition of claims of customers, but also to the claims of general creditors. *In the Matter of Lewellyn*, 26 B.R. 246, 253 (Bankr. S.D. Iowa 1982); *Gold v. Hyman*, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,043 at p. 97,657 (S.D.N.Y. 1975). To enable the trustee to carry out his responsibilities not only to customers but to the entire bankruptcy estate and its creditors, the trustee is given the same powers and title with respect to the debtor and its property as a trustee in bankruptcy, as well as powers that will enable him to perform the special functions of a SIPA liquidation. §78fff-1(a). *See SIPC v. Christian-Paine & Co.*, 755 F.2d 359, 361 (3d Cir. 1985). Estate property collected by the trustee

is distributed as specified in section 726 of the Bankruptcy Code. §78fff(e).

A SIPA proceeding has elements that differ from those of a bankruptcy proceeding. For example, the trustees and their counsel, while appointed by the district courts, are selected by SIPC. §78eee(b)(3). The trustee is responsible for mailing notices to customers and other creditors. §78fff-2(a)(1). Claims are submitted to the trustee instead of the court. §78fff-2(a)(2).

I. THE DECISION OF THE TENTH CIRCUIT IS IN ACCORD WITH THE LEGISLATIVE HISTORY OF, AND CASE LAW UNDER, SIPA.

Contrary to petitioners' contention, Cert. Pet. at 11-31, there is ample authority for bankruptcy judges to consider suits arising under provisions of the Bankruptcy Code in the context of a SIPA liquidation. As discussed below, the decision of the Tenth Circuit is in accord with the pertinent case law and with the legislative history of SIPA. Accordingly, there is no conflict that needs to be resolved by this Court.

Notwithstanding the enactment of the BAFJA, two sections of SIPA, 78eee(b)(4) and 78fff(b), supply a basis for the exercise of jurisdiction by the bankruptcy courts in SIPA cases. Each is considered in turn below.

Section 78eee(b)(4) is headed "Removal to Bankruptcy Court" and specifies that upon the issuance of the customer protective decree and appointment of a trustee, the district court "shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11." The section also provides that the "latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by" SIPA upon the district court ordering the removal. Because the courts with jurisdiction over Title 11 cases are now the district courts, a literal application of section 78eee(b)(4) requires the district court entering the customer protective decree to re-

move the proceeding to itself. Although section 78eee(b)(4) appears facially meaningless as a result of the BAFJA,[4] to avoid an interpretation that results in a "self-nullification" of the provision and produces an unreasonable result, as a court must, *see Gemsco, Inc. v. Walling*, 324 U.S. 244, 255 (1945), it is necessary to determine the purposes of SIPA, and specifically of section 78eee(b)(4), and to apply the statute in a way which will effectuate those purposes.

> It is the duty of [the] Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

Takao Ozawa v. United States, 260 U.S. 178, 194 (1922). *See E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 120-121 (1988) (court will not countenance interpretation of statutory language leading to absurd or futile results); *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 55 (1942); *Hill v. American Surety Co.*, 200 U.S. 197, 203 (1906). Adducing the intended meaning of section 78eee(b)(4) is also necessary to determine whether a conflict exists between it and the BAFJA, and if so, which statute must be enforced. *See Watt v. Alaska*, 451 U.S. 259, 265-67 (1981).

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[4] Inasmuch as all of the jurisdiction, powers, and duties which it purports to confer already reside in the district court upon the filing of the application to have the SIPC member placed in liquidation, see SIPA §78eee(b)(2)(A)(iii), the second clause of section 78eee(b)(4) also becomes meaningless or superfluous, in contravention of the rule that no part of a statute is to be construed as to be rendered superfluous. *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

A. The Intended Meaning and Purposes of Section 78eee(b)(4)

The relevant case law under, and history of, SIPA bear out the conclusion that Congress specifically intended that the proceedings be considered by the bankruptcy courts. Although, contrary to Petitioners' contention, the original version of SIPA did not expressly include a removal or referral provision, Cert. Pet. at 13, the Second Circuit concluded in *Exchange National Bank of Chicago v. Wyatt*, 517 F.2d 453 (2d Cir. 1975) ("*Wyatt*"), that referral of the proceedings to the bankruptcy courts effectuated the purposes of SIPA. In doing so, the court examined 1) section 5(b)(2) of SIPA, 15 U.S.C. §78eee(b)(2) (1970), giving to the district courts exclusive jurisdiction over the debtor and its property and the powers of a bankruptcy court and of a court in a proceeding under chapter X of the Bankruptcy Act;[5] 2) section 6(c)(1), 15 U.S.C. §78fff(c)(1) (1970), providing that the SIPA proceeding would be conducted "in accordance with, and as though it were being conducted under," specified provisions of the Bankruptcy Act; and 3) section 6(c)(2), 15 U.S.C. §78fff(c)(2) (1970), setting forth provisions that were unique to a SIPA liquidation. The court observed that since section 22 of the Bankruptcy Act, providing for a general reference of cases to referees in bankruptcy, was contained in a chapter of the Act which was applicable to a SIPA proceeding, reference of the SIPA proceeding would be proper. 517 F.2d at 456. The power of the district court to refer SIPA proceedings to referees in bankruptcy was not only "con-

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[5] In 1970, while specifying that a debtor under SIPA would not be reorganized, SIPA incorporated provisions of the Bankruptcy Act applicable to reorganization proceedings. In 1978, "since the aim of a SIPA proceeding is the liquidation, not reorganization, of a member," Congress deleted the reference to the reorganization provisions and expressly made the liquidation provisions applicable. *Hearings on H.R. 8331 Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., at 175-76 (1977). *See* Pub. L. No. 95-283, 92 Stat. 259 (1978), and Pub. L. No. 95-598, 92 Stat. 2675 (1978).

sistent with the purposes of SIPA but essential." 517 F.2d at 457. As the Second Circuit observed:

> The process for the determination of ["customer"] claims [in a SIPA proceeding] did not differ in any significant respect from what would have been required in a large stockbroker bankruptcy before enactment of SIPA; the difference lies in the supersession of § 60, sub. e of the Bankruptcy Act by the somewhat altered Special Provisions of §6(c)(2) of SIPA and the entitlement of "customers" as therein defined to benefit from the SIPC Fund. *This is the kind of business for which bankruptcy judges have developed special expertness and administrative skills and which Congress did not intend to dump on already overburdened district courts without needed clerical and other facilities.* [emphasis added].

517 F.2d at 457-58.[6]

Congress's intent that SIPA matters be heard by bankruptcy courts was made clear twice in 1978, when it first amended the statute to include section 78eee(b)(4), and when, several months later, it revised that section to its current form. The provision initially authorized the district court "at any stage of the [SIPA] proceeding, [to] refer the proceeding to a referee in bankruptcy to hear and determine any or all matters, or to a referee in bankruptcy

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[6] The notion that the bankruptcy court is best-equipped to handle the liquidation of financially failing securities broker-dealers continues to find support. See *S.E.C. v. American Bd. of Trade, Inc.*, 830 F.2d 431, 436-438 (2d Cir. 1987), and Anthony Michael Sabino, *The Role of Bankruptcy Courts in Stockbrokerage Liquidations*, 16 Sec. Reg. L. J. 227 (Fall 1988). In *American Board of Trade*, the Second Circuit expressed misgivings over the use of a district court equity receivership to effectuate the liquidation of insolvent entities, stating that the district court had undertaken to oversee routine bankruptcy matters, "without the aid of either the experience of a bankruptcy judge or the guidance of the bankruptcy code." 830 F.2d at 438. The Court of Appeals admonished that in the future, such receiverships were not to be continued "beyond the point necessary to get the estate into the proper forum for liquidation—the bankruptcy court." *Id.* at 437.

as special master to hear and report generally or upon specified matters." Pub. L. No. 95-283, 92 Stat. 257 (1978). In adding the section, Congress explained:

> Authority for the existing practice of referring all or part of a liquidation proceeding to a referee in bankruptcy, thereby in many cases expediting liquidation proceedings, is clarified. See, e.g., [*Wyatt*].

S. Rep. No. 763, 95th Cong., 2d Sess. 10 (1978). Subsequently, the 1978 Reform Act made certain amendments to SIPA to conform it to the Bankruptcy Code. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 19 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5805. Section 78eee(b)(4) was amended to its present form, providing for removal to the "court of the United States in the same judicial district having jurisdiction over cases under title 11." Pub. L. No. 95-598, 92 Stat. 2674 (1978). The intended court was the bankruptcy courts because under 28 U.S.C. §1471(c) (1978), they would exercise all of the jurisdiction of the district courts including jurisdiction over Title 11 cases.

Although SIPA was thereby brought in line with the broader jurisdiction and powers which the 1978 Reform Act conferred upon bankruptcy courts, Congress already independently had demonstrated its intent that SIPA liquidation proceedings be considered by the bankruptcy courts. Thus, in section 78eee(b)(4), as originally enacted, Congress expressly provided for referral of all or part of the proceedings to bankruptcy referees to make clear its intent, because such referrals would "expedite" the liquidations. When considered with SIPA section 78fff(b), *infra*, making Title 11 provisions applicable to a SIPA proceeding, the intent of current section 78eee(b)(4) is plain that except for the special protection afforded customers, SIPA liquidation proceedings are to be administered no differently than ordinary Title 11 bankruptcies. Unless Congress has now repealed section 78eee(b)(4) (which it has not), that intent must be given effect.

B. Fundamental Rules of Statutory Construction Dictate That Section 78eee(b)(4) Not Be Deemed Repealed.

The petitioners cavalierly dismiss section 78eee(b)(4). Yet, neither the BAFJA nor its legislative history mention SIPA, and there is nothing in them from which a repeal of the provision may be implied.

It is a "cardinal" rule of statutory construction that repeals by implication are not favored. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Watt v. Alaska, supra*, 451 U.S. at 267. Unless there is a clear legislative intent to repeal, a repeal by implication occurs only if there is a "manifest inconsistency" or "positive repugnance" between two statutes. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 565 (1963). *See Rosenberg v. United States*, 346 U.S. 273, 294-295 (1953); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-190 (1978). Even in the latter circumstance, the repeal is only "*pro tanto*, to the extent of the repugnancy." *United States v. Borden Co.*, 308 U.S. 188, 199 (1939). Furthermore, regardless of the order in which statutes are enacted, a general statute does not supersede a specific one unless the congressional intent is clear.

> [T]he Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment. . . .
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> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. ". . . . The intention of the legislature to repeal 'must be clear and manifest.' "

Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (citations omitted). *See Bulova Watch Co. v. United States*, 365 U.S. 753, 761 (1961); *Amrep Corp. v. F.T.C.*, 768 F.2d 1171, 1175-76 (10th Cir. 1985), *cert. den.*, 475 U.S. 1034 (1986). There is obviously no "clearly expressed congressional intent" to repeal section 78eee(b)(4). Furthermore, under the facts of this case, section 78eee(b)(4) is fully consistent with the BAFJA.

1. The Removal Clause of Section 78eee(b)(4)

The removal portion of section 78eee(b)(4) is consistent with the BAFJA. Initially, the BAFJA vests jurisdiction over Title 11 cases, proceedings, and related proceedings, in the district courts. The district courts may then refer the cases and proceedings to the bankruptcy courts. 28 U.S.C. §157(a). To implement section 157(a), the District Court adopted General Procedure Order No. 1984-3 ("GPO 1984-3"), under which all Title 11 cases and proceedings, and proceedings arising in or related to Title 11 cases, are "automatically referred" to the bankruptcy judges. GPO 1984-3, ¶2. In a similar vein, SIPA preliminarily vests jurisdiction over SIPA cases in the district courts, §78eee(b)(2), and then requires the district courts to remove them to the bankruptcy courts. §78eee(b)(4).

The main distinction between section 157(a) and SIPA is that referral under section 157(a) is discretionary with the district courts, while removal under SIPA is mandatory. As a practical matter, the difference between an automatic referral and a mandatory removal is insignificant, and plainly does not rise to the level of "manifest inconsistency" warranting that only one of the statutes be enforced. Furthermore, the district court's authority to withdraw a case or proceeding under section 157(d) can be reconciled with removal under SIPA. While section 78eee(b)(4) does not provide for a withdrawal, it does not prohibit it. In light of the BAFJA, SIPA section 78eee(b)(2)(A)(iii) now means that the district court in a SIPA case has the same powers and jurisdiction as a district court in a Title 11 case, except as inconsistent with

SIPA.[7] Thus, like the district court in an ordinary bankruptcy case, the district court in a SIPA case, if necessary, could also withdraw any portion or all of a SIPA case or proceeding.[8]

The above interpretation is consistent with the rules of statutory construction identified above. First, it effectuates the legislative intent that bankruptcy judges consider SIPA cases, at a minimum, to the same extent that they consider Title 11 cases. Second, it reconciles statutory provisions, as a court must. *See United States v. Hansen*, 566 F. Supp. 162, 165 (DDC 1983), *later proceedings*, 464 U.S. 1042 (1984) and 772 F.2d 940 (1985), *cert. den.*, 475 U.S. 1045 (1986); *Watt v. Alaska*, *supra*, 451 U.S. at 267; *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Third, it does not arbitrarily consider as repealed a "specific" statute, *i.e.*, SIPA, which was designed to govern a SIPA liquidation proceeding, in favor of a statute of more general application, *i.e.*, BAFJA. *See Brown v. General Services Administration*, 425 U.S. 820, 834-35 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (statute applicable to specific situation pre-empts general statute).

The removal aspect of section 78eee(b)(4) neither contradicts nor is inconsistent with the BAFJA. Section

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[7] A provision is inconsistent if it "conflicts with an explicit provision" of SIPA or if its application "would substantially impede the fair and effective operation of SIPA without providing significant countervailing benefits." *SIPC v. Charisma Sec. Corp.*, 506 F.2d 1191, 1195 (2d Cir. 1974). Since withdrawal would treat a SIPA liquidation like a bankruptcy case, as intended by Congress, there is no inconsistency.

[8] This was done, with SIPC's concurrence, in *SIPC v. Bevill, Bresler & Schulman, Inc.*, Civil Action No. 85-1715 (DRD) (D.N.J.). After removal and docketing of the case in bankruptcy court under section 78eee(b)(4), the district court used section 157(d) to withdraw the entire proceeding. Several firms related to the debtor in that case were involved in proceedings before the district court, and the SIPA liquidation could be administered most efficiently if all of the firms, including the debtor, were before the same court.

78eee(b)(4) is not impliedly repealed by the BAFJA and supplies the basis for the removal of SIPA liquidations to the bankruptcy courts.

2. The Powers, Duties, and Jurisdiction Clause of Section 78eee(b)(4)

Section 78eee(b)(4) also confers upon the bankruptcy courts the powers, duties, and jurisdiction under SIPA of the district courts. Under SIPA section 78eee(b)(2), the district court with which the application by SIPC is filed has exclusive jurisdiction of the debtor and its property, and exclusive jurisdiction of any suit against the trustee with respect to a SIPA liquidation. Unless inconsistent with SIPA, as mentioned above, the district court also has the jurisdiction, powers, and duties of a court having jurisdiction over Title 11 cases.

Under the BAFJA, the bankruptcy court exercises the district court's jurisdiction with respect to all cases under Title 11 and all "core" proceedings arising under Title 11, or arising in a case under Title 11, referred by the district courts. 28 U.S.C. §157(b)(1). Consistent with the foregoing section, the District Court has provided that "the bankruptcy judges of this district shall exercise the jurisdiction of this court in bankruptcy matters as provided in 28 U.S.C. §157(b)." GPO 1984-3, ¶2. The bankruptcy court's jurisdiction as to other matters is more limited. For example, in "non-core" proceedings related to Title 11 cases, absent the consent of the parties, the bankruptcy court only may submit proposed findings and conclusions to the district court for its consideration. 28 U.S.C. §157(c)(1).

With respect to the facts at hand, there is nothing in the BAFJA or in SIPA which would have limited the Bankruptcy Court's exercise of jurisdiction. Under SIPA section 78eee(b)(4), the bankruptcy court has the jurisdiction of a court "having jurisdiction over cases under title 11." Even under the BAFJA, and as provided in GPO 1984-3, the bankruptcy court would have considered, as here, proceedings to avoid preferences and fraudulent conveyances,

and those concerning the administration of the estate. 28 U.S.C. §§157(b)(2)(A), (F), and (H).

It bears emphasis that whether section 78eee(b)(4) permits bankruptcy courts to adjudicate what are essentially non-core "related proceedings" under the BAFJA is not at issue. The narrow question in this case, and the one to which the Court must confine its consideration, is whether SIPA provided authority for the Bankruptcy Court to adjudicate the instant "core" matters. To consider whether SIPA section 78eee(b)(4) confers overly broad powers on the bankruptcy courts, in some abstract situation, would be wholly improper. As stated in *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937):

> [Petitioner] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

See First National Bank & Trust Co. v. Beach, 301 U.S. 435, 438 (1937) (A court must "refuse to be led away from the limitations of the concrete case."); *Marathon, supra*, 458 U.S. at 90 (Particularly in the area of Article III courts, a court must "never . . .anticipate a question of constitutional law in advance of the necessity of deciding it," and "never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (Rehnquist, J., concurring). Under the facts of this case, section 78eee(b)(4) and the BAFJA are not "manifestly repugnant," and there is no implied repeal.

II. SECTION 78fff(b) SUPPLIES AN ADDITIONAL BASIS FOR JURISDICTION.

Even assuming *arguendo*, that section 78eee(b)(4) were invalid, SIPA section 78fff(b) supplies an alternate basis for jurisdiction. The fact that a provision of SIPA is held invalid does not affect the enforceability of the other sections of the statute. Thus, SIPA section 78bbb specifies

that except as otherwise provided in SIPA, the provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("the 1934 Act"), apply as if SIPA were a section of it. Under section 33 of the 1934 Act, 15 U.S.C. §78gg, the nullification of a provision of that act does not affect the validity of the remainder of the act.

There are two operative requirements in the first sentence of section 78fff(b). To the extent consistent with SIPA, the SIPA liquidation proceeding is to be conducted 1) "in accordance with" and 2) "as though it were being conducted under chapters 1, 3, 5 and subchapters I and II of chapter 7 of title 11." The provisions of Title 11 referred to in section 78fff(b) are *all* of the bankruptcy liquidation provisions of the Code, except for the stockbroker and commodity broker provisions. In order for the SIPA liquidation to be conducted "in accordance with" Title 11, sections 327, 329, 547, and 548 relied upon here, must be held to apply in a SIPA liquidation. *See In re Government Securities Corp.*, 972 F.2d 328, 330-331 (11th Cir. 1992), *cert. den.*, ___ U.S. ___ , 113 S. Ct. 1366 (1993).

Furthermore, because the SIPA liquidation must be conducted "as though it were being conducted" under the straight bankruptcy provisions of Title 11, the procedures that apply to Title 11 actions also must be deemed to apply to actions in SIPA liquidations. In the context of an ordinary bankruptcy case, this adversary proceeding raises "core" matters under 28 U.S.C. §157(b)(2)(A), (F), and (H), which automatically would be referred to the Bankruptcy Court under General Procedure Order No. 1984-3, and heard and considered by that court. If the second requirement of section 78fff(b) is to be implemented, there can be no different outcome here merely because the adversary proceeding is brought within a SIPA liquidation. The fact that a SIPA liquidation is simply an outright bankruptcy proceeding for all practical purposes has been consistently recognized. *See e.g., SIPC v. Ambassador Church Finance/Development Group, Inc., supra*, 788 F.2d at 1210; *SEC v. Albert & Maguire Securities Co.*, 560 F.2d 569, 572 (3d Cir. 1977); *Exchange National Bank*

of Chicago v. Wyatt, supra, 517 F.2d at 457-59. And, the conclusion that an adversary proceeding involving "core" matters, brought in the context of a SIPA liquidation, should be adjudicated no differently than the same proceeding in a bankruptcy case, comports with the result reached in all other SIPA cases. *See e.g., In the Matter of Perry, Adams and Lewis Securities*, 30 B.R. 845, 853-56 (Bankr. W.D. Mo. 1983); *In re Bell & Beckwith*, 54 B.R. 303, 306-308 (Bankr. N.D. Ohio 1985); *In re Blinder, Robinson & Co.*, 135 B.R. 899, 901 (D. Colo. 1992).

III. A SIPA LIQUIDATION PROCEEDING IS NOT EXCLUSIVELY A "TITLE 15" LIQUIDATION.

Because the adversary proceeding arises under Title 11 provisions that apply under SIPA section 78fff(b), the BAFJA itself supplies a basis of jurisdiction. Thus, 28 U.S.C. section 157(b)(1) which is part of the BAFJA authorizes bankruptcy judges to hear and determine core proceedings such as this one, arising under Title 11. In also providing that bankruptcy judges may hear and determine core proceedings arising in a Title 11 case, the BAFJA offers yet another basis for jurisdiction. Although the petitioners argue that SIPA cases and proceedings arise under Title 15 and not Title 11, and therefore, are beyond the scope of section 157, Cert. Pet. at 18-19, in fact, the SIPA liquidation proceeding is a Title 11 *and* a Title 15 case.

The SIPA "liquidation proceeding," defined at SIPA section 78*lll*(10), is the functional equivalent of the Title 11 "case." Within each may be brought adversary proceedings such as the one at hand, pursuant to various provisions of the Bankruptcy Code. See Bankruptcy Rule 7001. In determining whether the petitioners correctly characterize the liquidation proceeding or "case" as one under Title 15, it is important again to consider SIPA section 78bbb which makes SIPA a part of the 1934 Act, "except as otherwise provided in [SIPA]." The 1934 Act is contained in Title 15, and therefore, it stands to reason that the codifier, which is the Office of the I aw Revision

Counsel of the House of Representatives, would include SIPA in the same title.[9] But, in that regard, two points are significant.

One, as made evident by section 78bbb, Congress recognized that SIPA appropriately could be included under more than one title. The "[e]xcept as otherwise provided in [SIPA]" clause of section 78bbb relates to section 78fff(b). By specifying that a SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under" the liquidation provisions of Title 11, Congress recognized that the SIPA liquidation would proceed not only under Title 15, but under Title 11 as well. It is noteworthy that if Congress had viewed the SIPA liquidation proceeding as one only under Title 15, it could have amended the 1934 Act, in 1970, to include SIPA. Although various bills preceding H.R. 19333 (which was enacted as SIPA) proposed such an amendment,[10] Congress ultimately rejected these proposals. Instead, Congress specified in H.R. 19333 that SIPA simply would be considered a part of the 1934 Act,[11] except as otherwise provided in SIPA.

Two, the conclusion that the SIPA liquidation proceeding arises under Titles 11 and 15, also is supported by the fact that although SIPA has been designated to Title 15 by employees of the House of Representatives (*supra*, n.9), the title has never been enacted into positive law. In that regard, SIPA in Title 15, is only *prima facie* evidence of the statute as contained in the Statutes at Large. Under 1 U.S.C. section 204(a), unless enacted into positive law,

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[9] That Office "classif[ies] newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law." 2 U.S.C. §285b(4).

[10] For example, Senate Bills 3988 and 3989 provided that the "Securities Exchange Act of 1934 is amended by adding [SIPA]." 116 Cong. Rec. 20334 (1970).

[11] See H. R. Rep. No. 1613, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. CODE CONG. & ADM. NEWS 5257. See also Pub. L. No. 91-598, 84 Stat. 1637 (1970).

matter contained in the United States Code establishes *prima facie* the laws of the United States. Where Congress has not enacted a codification into positive law, the statute in the Statutes at Large is the legal evidence of the law. In that situation, and in the event of a discrepancy between the statute in the United States Code and in the Statutes at Large, it is the latter which prevails over the former. *United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964); *Stephan v. United States*, 319 U.S. 423, 426 (1943). Since Title 15 has not been enacted into positive law (see list of Titles following 1 U.S.C.A. §204), the decision to place SIPA under Title 15 has not been approved by Congress.[12] As such, Congress has never expressed an intent that SIPA be limited to that title. Because the instant adversary proceeding arises in a case that is under Title 11, as well as Title 15, the Bankruptcy Court had jurisdiction.

IV. THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH GRANFINANCIERA.

Petitioners argue that in *Marathon*, this Court identified the only three situations in which the judicial power may be exercised by judges who have not been appointed under Article III of the Constitution. U.S. CONST. art. III, §1. In petitioners' view, these consist of territorial courts, military courts, and courts in which "public rights" questions are adjudicated. Petitioners further maintain that in *Granfinanciera*, this Court determined that fraudulent conveyance and preference cases involve private, and not public, rights. Because the instant suit was based largely on a preference and fraudulent conveyance, or assertedly "private" rights, the Bankruptcy Court, which is not an Article III court, allegedly lacked jurisdiction. Cert. Pet. at 35-

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[12] Indeed, in section 362 of the Bankruptcy Code, Congress treats the SIPA proceeding as one under Title 11. For example, section 362(a)(2) provides that the filing of a bankruptcy petition or a SIPA application for a customer protective decree stays enforcement of any judgment "obtained before the commencement of the case under this title." "This title" refers to Title 11.

38. The position is meritless for at least two reasons. First, *Marathon* and *Granfinanciera* do not stand for the broad propositions advanced by the petitioners, and the decision of the Tenth Circuit is not in conflict with them. Second, the Tenth Circuit's conclusion that the Bankruptcy Court had jurisdiction in view of the petitioners' submission of a claim against the Debtor is consistent with the decisions of this Court.

A. The Cases Cited By Petitioners Are Inapposite.

Marathon did not purport to define the entire breadth of matters which non-Article III judges may decide. It reflected the views of a divided court, with no majority opinion being written in the case. Justice Brennan issued a plurality opinion in which three of the Justices concurred. Two of the Justices joined in the judgment, but not the opinion, of the court. Three Justices dissented. Since the issuance of *Marathon* in 1982, the Court has clarified the intended application of its holding. It is now plain that *Marathon* stands for the more narrow proposition stated by the concurring Justices therein, and reiterated in the dissent. Thus, in *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 584 (1985), the Court observed:

> The Court's most recent pronouncement on the meaning of Article III is *Northern Pipeline*. A divided Court was unable to agree on the precise scope and nature of Article III's limitations. The Court's holding in that case establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. . . .

See also *id.* at 585-586. This view was reaffirmed in *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 838-839 (1986).

In concurring in the *Marathon* judgment, Justice Rehnquist indicated that it would not be necessary for him to

decide whether "cases dealing with the authority of Congress to create courts other than by use of its power under Art. III . . . in fact support a general proposition and three tidy exceptions." 458 U.S. at 91. In light of the Court's later clarification that is in line with that position, the petitioners err in contending that *Marathon* reflects a broader holding. Whether or not petitioners correctly assert that public rights are not at issue in the instant proceeding brought within a SIPA case, *Marathon* did not divest the bankruptcy court of jurisdiction.[13]

Likewise, *Granfinanciera* offers the petitioners no support. In response to *Marathon*, Congress reconstituted the jurisdiction of the bankruptcy courts. In keeping with *Marathon*, the BAFJA distinguished "core" from "non-core" proceedings. The former included those that were "integral to the core bankruptcy function of restructuring the obligations of the debtor and his creditors." 130 Cong. Rec. H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). The latter "Marathon-type suits" were concerned with "State law issues that did not arise in the core bankruptcy function of adjusting debtor-creditor rights." *Id.*

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[13] In fact, public rights *are* at stake because this proceeding arises within a SIPA case. Because SIPA is rooted not only in the bankruptcy clause, but in the commerce clause, U.S. CONST. art. I, §8, cl. 3 and 4, "the power of Congress to modify substantial rights [by means of SIPA] rests upon a broad and substantial base." *SEC v. Albert & Maguire Sec. Co.*, 378 F.Supp. 906, 911, 912 (E.D. Pa. 1974). This Court has recognized that public rights arise when "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera*, 492 U.S. at 54. A trustee's capacity to recover monies owed to an estate is an integral part of the SIPA scheme. To the extent such funds are not recovered, SIPC advances monies to compensate for any shortfall to public investors and to satisfy the administrative expenses of the liquidation. SIPA §78fff-3(a) and (b). Should the SIPC fund become inadequate, the taxpayer's monies are used to meet those obligations. §78ddd(g) and (h). Thus, "public rights" are directly implicated in this adversary proceeding.

In *Granfinanciera*, a trustee in bankruptcy had sued to avoid an allegedly fraudulent conveyance under the Bankruptcy Code. Having filed no claim in the underlying bankruptcy case, the petitioners in that proceeding made a timely request for a jury trial. The issue decided in *Granfinanciera* was whether, under the circumstances, the Seventh Amendment afforded the petitioners a right to a jury trial notwithstanding that fraudulent conveyance actions were denominated as "core" proceedings in 28 U.S.C. section 157(b)(2)(H). U.S. CONST. amend. VII.

Because the right to a jury trial is preserved in "Suits at common law" in which legal, instead of equitable, rights are to be determined, the Court initially considered whether 1) historically, the action had been brought at law or in equity; and 2) the remedy sought was legal or equitable. 492 U.S. at 42. However, even if one concluded from that inquiry that a jury trial was available, the right nevertheless could be denied if "public rights" were at stake. *Id.* at 51. Although the Court determined that the fraudulent conveyance in that case seemed "more accurately characterized as a private rather than a public right," *id.* at 55, it declined to consider whether such suits could be adjudicated by bankruptcy courts.[14] *Id.* at 64.

For purposes of the instant petition, it is important to identify the precise issue in *Granfinanciera*. That issue, which repeatedly has been identified solely as one of entitlement to a jury trial,[15] is *not* before this Court. The petitioners in the case at hand never requested a jury trial.

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[14] Indeed, if the Court had concluded that fraudulent conveyance suits could not be determined by bankruptcy courts, it would not have left open the possibility, as it did, that the jury trial might be held before the bankruptcy court. 492 U.S. at 61-64.

[15] See *In re Great American Manufacturing and Sales, Inc.*, 129 B.R. 633, 636 (C.D. Cal. 1991); *In re Southern Indus. Banking Corp.*, 126 B.R. 294, 296-297 (E.D. Tenn. 1991); *City Fire Equip. Co. v. Ansul Fire Protection*, 125 B.R. 645, 649 (N.D. Ala. 1989); *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1401 (2d Cir.), *vacated and remanded*, 498 U.S. 964 (1990), *reinstated*, 924 F.2d 36 (2d Cir.), *cert. den.*, ___ U.S. ___, 111 S. Ct. 2041 (1991).

See Bankruptcy Rule 9015 (abrogated March 30, 1987); Fed. R. Civ. Pro. 38(b). Nor did they request the District Court to withdraw the reference to the Bankruptcy Court. 28 U.S.C. §157(d). Nor did they combine the two as would have been necessary in order to be deemed not to have waived the right. *In re Latimer*, 918 F.2d 136, 137 (10th Cir. 1990), *cert. den.*, ___ U.S. ___ , 112 S. Ct. 186 (1991).

The question which *is* at hand, namely, whether bankruptcy courts have jurisdiction over preference, fraudulent conveyance, and administration matter suits, was not raised or addressed in *Granfinanciera*. As to that question, the decision of the Tenth Circuit is fully consistent with the pertinent case law. Thus, the authority of bankruptcy courts to consider such actions consistently has been recognized. See, *e.g.*, *John E. Burns Drilling Co. v. Central Bank of Denver*, 739 F.2d 1489, 1493-1494 (10th Cir. 1984); *In re Committee of Unsecured Creditors of F S Comm.*, 760 F.2d 1194, 1199 (11th Cir. 1985); *Matter of Wood*, 825 F.2d 90, 97 (5th Cir. 1987); *In re Mankin*, 823 F.2d 1296, 1299-1310 (9th Cir. 1987), *cert. den.*, 485 U.S. 1006 (1988); *Stein v. Miller*, 158 B.R. 876, 879-880 (S.D. Fla. 1993); *In re Roppolo*, 111 B.R. 113, 115 (Bankr. W.D. La. 1990). *See also* 1 *Collier on Bankruptcy*, ¶3.01 at pp. 3-42—3-43 (15th ed. 1992) ("[n]o constitutional infirmity to assigning avoiding action jurisdiction to bankruptcy judges").

The cases relied upon by the petitioners do not suggest otherwise. *In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993), Cert. Pet. at 44, which involved the right to a jury trial in a non-core pre-petition breach of contract action, is irrelevant. Similarly, *In re Davis*, 899 F.2d 1136 (11th Cir. 1990), *cert. den. sub nom., Gower v. Farmers Home Admin.*, 498 U.S. 981 (1990), Cert. Pet. at 45-47, raises no conflict. In that case, the trustee sued to avoid a preferential transfer, and upon prevailing in the suit, sought an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA"). The jurisdiction of the bankruptcy court to consider the asserted preference was not challenged. The only question concerned the bankruptcy court's authority to determine the EAJA aspect of

the suit, a non-core matter committed by statute to consideration by Article III courts. 899 F.2d at 1138-1139. In *dictum*, the *Davis* court noted that this Court, in *Granfinanciera*, had strongly suggested that fraudulent conveyance and preference suits involve private rights, but had "specifically avoided holding" that such suits must be tried by Article III courts. The Eleventh Circuit observed that the question was not before it, and accordingly, it would express no opinion as to its merits.[16]

B. The Bankruptcy Court Had Jurisdiction Because the Petitioners Filed a Claim and Counterclaims.

The Bankruptcy Court had jurisdiction not only because this is a "core" proceeding, but because the filing of a claim by Mr. Davis and of counterclaims by both of the petitioners subjected them to that court's jurisdiction. As mentioned above, Mr. Davis filed a claim with the Trustee. The Trustee issued no claim determination and instead, instituted this adversary proceeding. Additionally, in their Answer, Grounds of Defense, and Counterclaim, to the complaint herein, the petitioners asserted two counterclaims. Under the first, they sought repayment of certain expenditures allegedly made in connection with their representation of IBI. Under the second, they contended that the Trustee had refused to release stock in Mr. Davis's name. The stock was the subject of the claim filed with the Trustee. Petitioners requested that the Bankruptcy Court enter judgment for them on both counterclaims.

Citing *Katchen v. Landy*, 382 U.S. 323 (1966) ("*Katchen*"), the Tenth Circuit concluded that the filing of a claim against the estate in this case reinforced the con-

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[16] Petitioners contend that the trial in this case should have been held before the District Court because the subsequent review by that court resulted in their receiving "only a second-hand determination" of credibility and factfinding. Cert. Pet. at 41. It is curious that factfinding and observation of the demeanor of witnesses suddenly have become important, when earlier in the case, in moving for summary judgment, petitioners represented that "there [was] no genuine issue as to any material fact."

clusion that the Bankruptcy Court had jurisdiction. A19. Petitioners now argue that the claim should be disregarded because it was filed in a SIPA proceeding and in their view, not in a Title 11 case, and that in any event, the adversary proceeding should have been considered, as an initial matter, by an Article III judge. Cert. Pet. at 48-62. Petitioners' arguments are made for the first time, and should be disregarded as untimely. *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 1649 (1992); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Timeliness aside, the arguments raise no issue worthy of review.

1. The Consent to Jurisdiction

In *Katchen*, this Court stated:

> "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance. * * *
>
> * * * * * * *
>
> "Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief." ***
>
> Our examination of the structure and purpose of the Bankruptcy Act and the provisions dealing with allowance of claims therefore leads us to conclude, and we so hold, that the Act does confer summary jurisdiction to compel a claimant to surrender preferences that under §57, sub. g would require disallowance of the claim. [Citation omitted].

382 U.S. at 335.[17]

By filing a claim in the SIPA proceeding, for the reasons discussed *infra*, Mr. Davis invoked the jurisdiction of the Bankruptcy Court. The fact that the claim was filed in a SIPA proceeding with the Trustee warrants no different conclusion. SIPA §78fff-2(a)(2). See Cert. Pet. at 49-51. "Claim" is broadly construed and includes any "right to payment," such as that asserted by Mr. Davis. See 11 U.S.C. §101(5) and SIPA §78fff(b). See also *Johnson v. Home State Bank*, ___ U.S. ___, 111 S. Ct. 2150, 2154 (1991) (claim includes broadest possible definition). Even assuming, *arguendo*, that the claim had to be filed with the Bankruptcy Court, as Petitioners assert, the submission in the adversary proceeding of a counterclaim premised on Mr. Davis's claim in the SIPA liquidation proceeding amounted to the filing of a "claim" with the court. See *infra*. The contention that the SIPA claim does not imply consent because "the SIPA claims process is not subject to the control and supervision of the bankruptcy judge," Cert. Pet. at 50-51, also is erroneous. In fact, the Trustee sought and obtained approval from the Bankruptcy Court with regard to his actions concerning the claims process. Thus, on July 24, 1981, the Bankruptcy Court issued an order governing the mailing of claim forms to customers and other creditors, setting the period for the filing of claims, and directing that claims be filed with the Trustee.

By counterclaiming, Davis, Gillenwater & Lynch also subjected itself to the jurisdiction of the Bankruptcy Court. Thus, a counterclaim constitutes a "claim." *Bayless v. Crabtree Through Adams*, 108 B.R. 299, 305 (W.D. Okl. 1989), *aff'd.*, 930 F.2d 32 (10th Cir. 1991); *In re Allied*

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[17] Section 57g of the Bankruptcy Act, 11 U.S.C. §93g (repealed 1979), was the predecessor to section 502(d) of the Bankruptcy Code, 11 U.S.C. §502(d). Under both sections, any preference or fraudulent transfer issues asserted by a trustee against a claimant must be resolved before the claim can be allowed. *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1327 n.5 (2d Cir. 1993).

Companies, Inc., 137 B.R. 919, 924-925 (Bankr. S.D. Ind. 1991).

2. Adjudication by a Non-Article III Court

The authority relied upon by the petitioners for their contention that in any event, they were entitled to an adjudication by an Article III judge, is confusing at best. On the one hand, they assert that "*Granfinanciera* establishes conclusively that a matter involving private rights ought not be adjudicated in a non-Article III Court." Cert. Pet. at 37. On the other, *Granfinanciera* is a "Seventh Amendment [case]," that "simply [does] not address fully the jurisdictional issue of whether petitioner is entitled to an Article III adjudication in equity." *Id.* at 57-58. In fact, Petitioners can point to no persuasive authority because there is none. The law is clear that because the amounts, if any, owed to the petitioners by the estate could not be decided until the amounts owed by them had been determined, the Trustee's action to recover those sums became "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (emphasis in original). See *Granfinanciera*, 492 U.S. at 57-59; *In re Blinder, Robinson & Co.*, 135 B.R. 899, 901-902 (D. Colo. 1992); *In re Hooker Investments, Inc.*, 937 F.2d 833, 838-840 (2d Cir. 1991); *In re Jensen*, 946 F.2d 369, 373 (5th Cir. 1991).

This case presents no conflict between court decisions and does not present the type of important question warranting review. It is significant only to the parties involved, and has no implications other than in the narrow body of SIPA cases. In the end, the petition is no more than an effort by the petitioners to prolong this matter needlessly in the hope ultimately of escaping their obligations under the Bankruptcy Code, at the expense and to the detriment of the Debtor's estate and its creditors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

Section 2 of the Securities Investor Protection Act, 15 U.S.C. §78bbb (1988):

> APPLICATION OF SECURITIES EXCHANGE ACT OF 1934
>
> Except as otherwise provided in [SIPA], the provisions of the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] (hereinafter referred to as the "1934 Act") apply as if [SIPA] constituted an amendment to, and was included as a section of, such Act.

Section 6(b) of the Securities Investor Protection Act, 15 U.S.C. §78fff(b) (1988):

> APPLICATION OF TITLE 11
>
> To the extent consistent with the provisions of [SIPA], a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11. For the purposes of applying such title in carrying out this section, a reference in such title to the date of the filing of the petition shall be deemed to be a reference to the filing date under [SIPA].

Section 5(b)(4) of the Securities Investor Protection Act, 15 U.S.C. §78eee(b)(4), *prior to amendment* (1978):

> REFERENCE TO REFEREE IN BANKRUPTCY—If the court issues a protective decree and appoints a trustee under this section, such court may, at any stage of the proceeding, refer the proceeding to a referee in bankruptcy to hear and determine any or all matters, or to a referee in bankruptcy as special master to hear and report generally or upon specified matters. Only under special circumstances shall a reference be made to a special master who is not a referee in bankruptcy.

Section 547(b) of the Bankruptcy Code, 11 U.S.C. §547(b) (1988):

§547. Preferences

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 548(a) of the Bankruptcy Code, 11 U.S.C. §548(a) (1988):

§548. Fraudulent transfers and obligations.

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer, or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

1 U.S.C. Section 204(a) (1988):

> **United States Code.**—The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature . . . *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

No. 93-955

Supreme Court, U.S.
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JAN 26 1994
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, indivdually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE
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In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

In tacit recognition that the questions presented in the certiorari petition are substantial, the brief in opposition endeavors for 30 pages -- the maximum permitted by this Court's rules -- to show that the decision below is of little moment.

On analysis of those many pages,

however, what the opposition brief does is confirm that the matters raised in the petition are significant questions which merit this Court's attention. Respondents' repeated claim (Opp. Br. at 5, 30)[1] that this case affects only a narrow segment of SIPA litigants rings particularly hollow. This petition addresses questions at the very heart of the bankruptcy system, and the decision appealed from calls into question the continued vitality of recent opinions of this Court. If alleged fraudulent conveyances and preferences involve "private rights" as this Court stated in Granfinanciera v. Nordberg, 492 U.S. 33 (1989), then how can Congress' "taxonomic" denomination of such matters as "core proceedings" automatically divest petitioners

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[1]References to the Brief of Respondents in Opposition to the Petition for Writ of Certiorari shall be to "Opp. Br."

of their entitlement to an Article III adjudication?

Notably, the central reason offered by respondents for denying petitioners an Article III adjudication is that petitioners allegedly submitted themselves to the equitable jurisdiction of the bankruptcy court by filing a SIPA proof of claim and a counterclaim in the bankruptcy court. Respondents allege that this constituted a waiver of any right to an Article III adjudication. What respondents neglect to tell this Court is that when these filings were made it was before 1984, at a time when there was believed to be jurisdiction in the bankruptcy court under the Bankruptcy Reform Act of 1978. That court was, of course, abolished by BAFJA in July, 1984. Upon enactment of BAFJA, petitioners promptly notified the bankruptcy judge that he lacked

jurisdiction to hear and determine the matter -- and he agreed.

With respect to the interplay of 15 U.S.C. § 78eee(b)(4) and 28 U.S.C. §§ 157 and 1334, respondents provide a lengthy explanation as to why a literal interpretation of Congress' actual language in those statutes must be disregarded. Respondents argue that, based upon their perception of Congressional intent (under the unconstitutional jurisdictional provisions of the 1978 Bankruptcy Reform Act), Congress meant precisely the opposite of what it said. Again, respondents' discussion illustrates that determinations of the proper scope of bankruptcy jurisdiction are thorny issues which cry out for further clarification from this Court.

ARGUMENT

I. THE PREFERENTIAL AND FRAUDULENT TRANSFER PROCEEDINGS IN THIS CASE ARE MATTERS OF PRIVATE RIGHT THEREBY ENTITLED TO ADJUDICATION BY AN ARTICLE III COURT AND PETITIONERS DID NOT WAIVE THIS ENTITLEMENT.

A. The respondents' interpretation of this Court's decision in Granfinanciera highlights the existing confusion.

Respondents incorrectly and summarily dismiss Granfinanciera as being inapplicable and uninstructive. Respondents argue that this Court's decision in Granfinanciera is limited to "one of entitlement to a jury trial [which] is not before this Court." (Opp. Br. at 25). Ironically, respondents' position illustrates the continued confusion regarding the scope and impact of this Court's decision in Granfinanciera.

While Granfinanciera involved the right to a jury trial, this Court expended great effort in analyzing the history of the right

to trial by jury, and its constitutional and procedural impact. In delineating the important substantive differences between matters of private right and public right, this Court reaffirmed that an action which involves a private right can only be adjudicated by an Article III Court. Granfinanciera, 492 U.S. at 53. (Pet. at 36-40.)

The underlying action in Granfinanciera, namely, the recovery of alleged preferences and fraudulent conveyances, is identical to the underlying action in this case. Granfinanciera stands for the proposition that such proceedings are matters of private right, subject to adjudication by an Article III court. Granfinanciera, 492 U.S. at 53. Respondents apparently take the position that, although this Court has held such actions to be matters of private right, this

Court did not intend them to be treated as private rights unless a jury trial was requested.

After dismissing Granfinanciera out of hand, respondents cite six cases at page 26 of their brief for the proposition that the "decision of the Tenth Circuit is fully consistent with the pertinent case law." Four of these six cases were decided before this Court's decision in Granfinanciera, and therefore do not address the issues present in this case.[2]

The two post-Granfinanciera cases cited by respondents illustrate the continuing

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[2]Notably, in the case of In re Mankin, decided pre-Granfinanciera, the Ninth Circuit, relying on the designation by Congress of fraudulent conveyance actions as core proceedings, stated that the designation "as a core proceeding would not justify the Bankruptcy Court's jurisdiction if we were to find that . . ." the underlying core proceeding did not involve a public right. 823 F.2d at 1307. (Pet. at 43.)

confusion since that decision. The most recent of these two cases is Stein v. Miller 158 B.R. 876 (S.D. Fla. 1993). That case involved actions brought by the bankruptcy trustee to avoid allegedly preferential and fraudulent transfers in the bankruptcy court The transferrees, citing to Granfinanciera, requested a jury trial of these issues.

The transferrees also specifically requested that motions be heard and decided by an Article III judge. The district court specifically noted that this Court's decision in Granfinanciera ". . . appears to dictate an article III forum for the adjudication of 'private right' claims." 158 B.R. at 879. The district court refused to follow that dictate, reasoning that the fact that this Court left open the question of bankruptcy court conducted jury trials evidenced a contrary reading of this Court's opinion.

The district court acknowledged that "the Eleventh Circuit has noted the difficulty of this issue . . . ." 158 B.R. at 878, citing to In re Davis, 899 F.2d 1136 (11th Cir. 1990) cert. denied, 498 U.S. 981 (1991).[3]

Despite the clear language of Granfinanciera regarding the distinction between the treatment of matters of private and public right, confusion and uncertainty reign among the courts at this time.

B. This Court's decision in Katchen v. Landy does not divest petitioners of their right to have an Article III judge adjudicate the matters at issue.

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[3]Notably in Stein the summary judgement motion at issue could be heard de novo by the district court, as it involved only questions of law and did not involve findings of fact. Stein, 158 B.R. at 879-880. Similarly, the other post-Granfinanciera opinion relied upon by respondents, In re Roppolo, 111 B.R. 113 (Bkrtcy. W.D. La. 1990), speaks volumes as to the difficulty courts have faced in grappling with the issues raised by this Petition.

Citing this Court's decision in Katchen v. Landy, 382 U.S. 323 (1966), respondents state that petitioners invoked the jurisdiction of the Bankruptcy Court. Respondents understandably chose to ignore the discussion of Katchen contained in Pet. at 54-57. As discussed in greater detail therein, the effect of this Court's decision in Katchen is to convert legal claims into equitable claims as a part of the process of allowing claims, if the creditor has filed a proof of claim. It is petitioners' position that a SIPA proof of claim, filed with a SIPA Trustee in a SIPA liquidation proceeding, is not sufficient to constitute a claim filed with the bankruptcy court. (Pet. at 48-51.)

Furthermore, Katchen did not address the issue of a litigant's entitlement to have a private right adjudicated by an Article III judge. Perhaps most significantly, Katchen

was decided in 1966 when the district court essentially was permitted to review the findings of the bankruptcy referee de novo, and the litigant had the opportunity to request an Article III adjudication of findings of fact. Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79, n.31 (1982).

The filing of a claim does not convert a private right into a public right, thereby vesting jurisdiction in a non-Article III court. Thus, Katchen does not support respondents' position.

C. Petitioners did not consent to jurisdiction in a non-Article III court, and petitioners neither did nor could waive their right to raise these jurisdictional matters.

Respondents state, without authority, that "by filing a claim in the SIPA proceeding. . . Mr. Davis invoked the jurisdiction of the Bankruptcy Court. The

fact that the claim was filed in the SIPA proceeding with the Trustee warrants no different conclusion." Opp. Br. at 29, citing 11 U.S.C. § 101(5) and SIPA §78fff(b).

In fact, there are significant differences between the Title 11 claims process and that of SIPA. (Pet. at 48-51.) Section 78fff(b) of SIPA, which provides that a liquidation proceeding under SIPA shall be conducted in accordance with Chapters 1, 3 and 5 and subchapters I and II of Chapter 7 of Title 11, does not go so far as to make those provisions of Title 11 specifically applicable in a SIPA liquidation case.

Significantly, Section 329, by its terms, is made applicable only to the attorney for a debtor in a case commenced under Title 11. 11 U.S.C. §101(13). Therefore, Section 329 does not become applicable unless a debtor's attorney is

ordered to comply with that Section by court order. Inasmuch as an attorney for a debtor in a SIPA liquidation case is not required, automatically, to comply with Section 329, it is inherently inequitable to find that the entering of a court order mandating such compliance is sufficient to waive petitioners' right to an Article III adjudication.

Likewise, the counterclaim filed by petitioners does not constitute a waiver. Respondents erroneously assert that this "counterclaim constitutes a 'claim'", and that petitioners thus "subjected [themselves] to the jurisdiction of the bankruptcy court." What respondents neglect to note is that the counterclaim in question was filed in March, 1982, three months prior to this Court's decision in Marathon. At the time the counterclaim was filed, the ill-fated

bankruptcy court had exclusive jurisdiction under the 1978 Bankruptcy Act. BAFJA was still two years away. Consequently, at the time the counterclaim was filed, petitioners had no choice but to file the counterclaim i the court which Congress assumed was a court of the United States, and which was, at that time, the only court which had jurisdiction.

Following the effective date of BAFJA, petitioners promptly notified the bankruptcy judge that he lacked jurisdiction to hear th matter. Petitioners have zealously preserve their right to an Article III adjudication a every stage of these proceedings and respondents lamentations are completely without merit.

Respondents, similarly, cry "waiver"

with regard to several jurisdictional arguments raised in the Petition. (Opp. Br. at 27-30.) These protests are unfounded, and, in any event, an objection to a court's lack of jurisdiction over the subject matter may be raised for the first time in a court of appellate review. Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U.S. 635 (1945); see also, California v. La Rue, 449 U.S. 109 (1972).

Rule 12(h)(3) of the Federal Rules of Civil Procedure codifies the established rule that jurisdiction over subject matter cannot be created or waived by the parties, and may be considered upon motion by any interested party at any time. C. Wright and A. Miller, Federal Practice and Procedure 1393, p. 864-866. Rule 12(h)(3) is incorporated into the Bankruptcy Rules by Bankruptcy Rule 7012(b).

II. CONGRESS HAS NOT PROVIDED ANY STATUTORY BASIS FOR CONFERRING JURISDICTION OF TITLE 15 LITIGATION UPON BANKRUPTCY JUDGES.

Respondents concede that a literal interpretation of relevant statutes does not give bankruptcy judges jurisdiction of Title 15 matters. Simply put, under 28 U.S.C. § 1334 district courts have "original and exclusive jurisdiction of all cases under Title 11"; under 15 U.S.C. § 78eee(b)(4) SIPA matters are to be heard in the court of the United States "having jurisdiction over cases under Title 11"; and under 28 U.S.C. § 157 a district court may refer to a bankruptcy judge only "cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11." Confronted by the fact that Title 15 proceedings do not fall into any of these categories, (and that all federal courts are

courts of limited jurisdiction), respondents resort to various efforts to rewrite the plain meaning of the above statutes.

Respondents suggest that § 78eee(b)(4) has been rendered "facially meaningless" (Opp. Br. at 3, 10) thereby justifying a detailed survey of Congressional intent. Respondents ignore that the statute plainly gives jurisdiction of SIPA matters to district courts (as the courts having jurisdiction over Title 11 cases). Then, when respondents resort to legislative history, they focus on the unconstitutional jurisdictional provisions of the 1978 Bankruptcy Reform Act as the source of the intent on which they rely.[4] Under respondents' interpretation, the court in

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[4]For discussion of the repeal of the Bankruptcy Reform Act of 1978 and abolishment of Bankruptcy Courts established thereunder see Pet. at 12-19.

which Congress supposedly intended SIPA matters to be heard is the 1978 "bankruptcy court." But that court was abolished in 1984 and its jurisdiction was transferred to the district court under BAJFA. Again, the 1984 amendments to 28 U.S.C. § 1334 limited referral of Title 15 matters to district courts. Respondents repeatedly misplace reliance on abolished courts and repealed legislation for the backbone of their "legislative history" argument.

Moreover, respondents cavalierly assume that Congress, in failing to grant jurisdiction of Title 15 matters to bankruptcy judges, simply did not foresee the SIPA consequences of BAFJA. Respondents fail to address this Court's relevant precedent "that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give

effect to its plain meaning." Union Bank v. Wolas, 502 U.S. _____, 112 S.Ct. 527, 531 (1992); Toibb v. Radloff, 501 U.S. _____, 111 S.Ct. 2197 (1991).

Next, in an effort to fit SIPA within the jurisdictional parameters of 28 U.S.C. § 1334, respondents offer analysis as to how SIPA can be viewed as a proceeding under both Title 15 and Title 11 or, in the alternative, why SIPA matters are not Title 15 matters at all (because they have not been enacted into "positive law") and should, instead, be viewed as cases arising under Title 11. Not surprisingly, respondents offer no case law suggesting that SIPA is anything but a Title 15 entity. More importantly, respondents' creative and varied explanations as to how SIPA should be interpreted in the confusing post-BAFJA era only highlight the need for clarification from this Court as to the

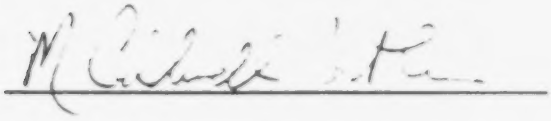
parameters of the jurisdiction afforded bankruptcy judges under BAFJA.[5]

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GILBERT K. DAVIS AND
DAVIS, GILLENWATER & LYNCH



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[5]One of the creative explanations offered by respondents is found in their footnote 13, where they suggest that "public rights are at stake because this proceeding arises within a SIPA case", and "[b]ecause SIPA is rooted in the commerce clause." Opp. Br. at 24, n.13. Ironically, if respondents' strained assertions are correct, the district court is mandated to withdraw the reference under 28 U.S.C. 157(d), which states in relevant part that "the district court shall, on timely motion of a party, so withdraw a proceeding if it determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating . . . activities affecting interstate commerce." (emphasis added.)

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CERTIFICATE OF MAILING

I, M. Caldwell Butler, do hereby certify that I mailed prepaid, a true and correct copy of the foregoing on this the 26th day of January, 1994, to the following: Mr. Theodore H. Focht, Ms. Josephine Wang, Mr. Michael E. Don, counsel for Securities Investor Protection Corporation, Office of General Counsel, 805 15th Street, N.W., Suite 800, Washington D.C. 20005-2207; and Ms. Adrienne H. Benavidez, Ms. Maria J. Flora Gorsuch, Kirgis, Campbell, Walker & Grover, counsel for James H. Turner, Trustee, 1401 17th Street, Suite 1100, P.O. Box 17180, Denver, CO 80217-0180.

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